

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**







## TABLE OF CONTENTS

|                                                                                                                                           | <u>Pages</u> |
|-------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| Table of Cases . . . . .                                                                                                                  | iii          |
| Questions Presented. . . . .                                                                                                              | iv           |
| Preliminary Statement. . . . .                                                                                                            | 1            |
| Statement of Facts . . . . .                                                                                                              | 2            |
| Point I. . . . .                                                                                                                          | 6            |
| The Refusal of the Trial Court to Instruct on<br>the Lesser Included Offense was Error.                                                   |              |
| (1) In this case a proper request was made.                                                                                               | 6            |
| (2) The elements of the lesser offense are<br>identical to part of the elements of the greater<br>offense.                                | 6            |
| (3) There is evidence that would justify<br>conviction of the lesser offense                                                              | 7            |
| (4) The jury could have consistently found<br>the defendant innocent of the greater charge, but<br>guilty of the lesser included offense. | 8            |
| (5) There is mutuality.                                                                                                                   | 12           |
| Conclusion . . . . .                                                                                                                      | 13           |
| Statutes . . . . .                                                                                                                        | 14           |



Pages

APPENDIX

|                                                                                       |      |
|---------------------------------------------------------------------------------------|------|
| Relevant Docket Entries. . . . .                                                      | A- 1 |
| Judgment and Committment Order . . . . .                                              | 3    |
| Complaint - Magistrate's Docket 77-3M. . . . .                                        | 4    |
| Indictment - Cr. 77-9. . . . .                                                        | 6    |
| Information - U.S. v. Miller, Cr. 77-9 . . . . .                                      | 9    |
| Defendent's Request to Charge No. 1. . . . .                                          | 11   |
| Gov. Ex. 3 - Canadian Immigration<br>Identification Record ("Landing Card") . . . . . | 12   |
| Statutes                                                                              |      |
| 8 U.S.C. §§1324, 1325 . . . . .                                                       | 13   |
| Index to Record on Appeal. . . . .                                                    | 14   |
| Denial of Request to Charge. . . . .                                                  | *    |
| Charge of the Court. . . . .                                                          | **   |

\*Numbering as in Transcript - pp. 332-39.

\*\*Numbering as in original - pp. 390-437.

# TABLE OF CASES

|                                                                        |                      |
|------------------------------------------------------------------------|----------------------|
| <u>Berra v. United States</u> , 351 U.S. 134, 137 (1956)               | <u>Pages</u><br>7, 8 |
| <u>McFarland v. United States</u> , 19 S.2d 805 (6th Cir. 1927)        | 12                   |
| <u>Sansone v. United States</u> , 380 U.S. 343, 350 (1964)             | 8                    |
| <u>United States v. Brischetto</u> , 538 S.2d 208, 209 (8th Cir. 1976) | 6                    |
| <u>United States v. Brown</u> , 551 F.2d 236, 239 (1977)               | 6, 8                 |
| <u>United States v. Comer</u> , 137 U.S. App. D.C. 214, 421 F.2d       | 12                   |
| <u>United States v. Crutchfield</u> , 547 F.2d 496 (9th Cir. 1977)     | 11                   |
| <u>United States v. Harary</u> , 457 F.2d 471, 478 (2d Cir. 1972)      | 9                    |
| <u>United States v. Seijo</u> , 537 F.2d 694 (2d Cir. 1976)            | 11                   |
| <u>United States v. Thompson</u> , 492 F.2d 359, 362 (8th Cir. 1974)   | 6                    |
| <u>United States v. Washington</u> , 471 S.2d 402 (5th Cir. 1973)      | 12                   |
| <u>United States v. Whitaker</u> , 144 U.S. at App. D.C. 344 (1971)    | 6                    |

## STATUTES CITED

|                |          |
|----------------|----------|
| 8 U.S.C. §1324 | 2, 5, 7  |
| 8 U.S.C. §1325 | 5, 7, 13 |
| 18 U.S.C. §111 | 5        |
| 18 U.S.C. §371 | 1, 5     |



QUESTIONS PRESENTED

1. Was Conspiracy, under Title 18 U.S.C. §371, to violate §1325 of Title 8 U.S.C., on the facts of this case, a lesser included offense to Count I of the indictment charging Conspiracy to violate §1324(a)(1) of Title 8 U.S.C. ?
2. Was it error for the trial court to refuse to charge that lesser included offense?

PRELIMINARY STATEMENT

On January 20, 1977, an indictment was filed charging the appellant and Lloyd Miller in three counts with violations of §371 of Title 18 U.S.C. and §§1324(a)(1) and (4). Appellant was additionally charged in a fourth count of Resisting an Immigration Officer, §111 of Title 18 U.S.C.

On January 21, 1977, appellant appeared with his attorney, Mark J. Mahoney; a plea of not guilty was entered.

On May 23, 1977, appellant appeared alone with his attorney, Mark J. Mahoney, for the commencement of trial, Lloyd Miller having pled guilty to the misdemeanor of Conspiracy, 18 U.S.C. §371, to violate §1325 of Title 8 U.S.C., and now a witness for the prosecution.

At the conclusion of the evidence the court granted the appellant's motion for dismissal of Count III. The court denied the defendant's request to instruct the jury on the lesser offense of Conspiracy to violate §1325 of Title 8 U.S.C., from which denial the appellant hereby appeals.

On July 11, 1977, appellant for his sentence to fifteen months imprisonment on each count, to run concurrently, the Hon. John T. Elfvin, District Court Judge, presiding.

Appellant filed a timely notice of appeal.



### STATEMENT OF FACTS

On January 7, 1977, three residents of Kitchener, Ontario, Canada, Harri Prashad, Lloyd Miller, and Gormanston Wishart, came to Fort Erie, Ontario as co-equal partners in a scheme to help Mr. Prashad illegally cross the border into the United States using the Canadian Immigration papers of Lloyd Miller, for whom \$150.00 was paid by Prashad. Mr. Wishart drove the car. Following their testimony for the prosecution, Messrs. Prashad and Miller were homeward bound; Mr. Wishart, the appellant, serves 15 months.

In 1975, Harri Prashad, a citizen of Guyana, entered Canada by prearrangement to marry a woman he knew previously in Guyana, thereby enabling himself to remain in Canada longer than a mere "visitor" (79). It was a June wedding, the separation was in December (42). This wife, his second, withdrew her sponsorship, leaving Mr. Prashad a "visitor" in Canada; he was directed to leave by January 10, 1977 (23).

On January 7, 1977, Prashad spoke with the appellant asking if he would help him get into the United States to visit his former wife before returning to Guyana (25, 51).\*

---

\*Prashad was determined to testify at trial that he knew there was no hope of reconciliation with his first wife in New York, and that he "knew for sure" she had remarried (46-47). (Count III of the indictment charged the defendant with having encouraged Harri Prashad to enter the U.S., 8 U.S.C., §1324(a)(4).)

However, in a letter to appellant's wife, from New York City where Prashad was staying between his arrest and his testimony, he wrote



The appellant told Prashad that he might use a Canadian Immigration Identification Record ("landing card") obtained from a friend, Lloyd Miller, who would require \$150.00 from Prashad. Appellant told Prashad that, with the landing card, he could pass to the United States; they would leave that night for Fort Erie, Ontario (26, 27, 52).

The appellant called Prashad around 8:00 o'clock p.m. on January 7, and advised that they would be leaving within the hour (28). At this time Prashad also talked with Mr. Miller on the telephone who assured him that his landing card could be used (53-54).\* The appellant picked up Harri Prashad and they drove to Lloyd Miller's home (29, 54). They drove approximately two hours to Fort Erie, Ontario, where they stopped for beer and rented a motel room (29). Miller gave

---

with reference to this former wife:

She encouraged me a lot to come here. I practically asked her if she's married or not. She says she do not have any man or she is not married. Bearing this in mind, I took a chance at least to talk a few things over before I go home. As you know, Gorman, Lloyd and me were put in prison innocently. Now I discover she got married to a man with children since last year, and every cent she work for, the man demands. Why did she have to lie so much? She could tell me over the phone that she is married and I would have gone my way but I tell you about these people, everybody likes to see me become a beggar (74).

\*Miller denies having talked to Prashad at this point in time.

his landing card to the appellant who gave it in turn to Mr. Prashad (31). The appellant and Mr. Prashad, at around 1:00 o'clock a.m. on January 8, 1977, left Mr. Miller with Mr. Prashad's luggage (30); only appellant returned later, around 5:00 o'clock a.m., stating to Miller "Harri has gone across to the States . . . . The car broke down and Harri is gone, we will see Harri later when we go over." (210-11)

Prashad denied that other arrangements had been made for his actual entry into United States than to be driven across the Peace Bridge by Mr. Wishart (55). In any event they met at the Greyhound station in Buffalo, where Mr. Prashad gave Miller's landing slip and \$150.00 to appellant and, gratuitously, \$20.00 for the appellant's own expenses (56-57). The appellants left the bus station at about 2:30 a.m. and returned sometime later to the Canadian motel.

Mr. Prashad planned to leave on the 5:50 a.m. bus for New York where he would be met by his brother-in-law, Zeman, also unlawfully in the Country, but his plan was thwarted by his arrest at about 4:00 o'clock a.m. by Immigration Officers (36).

Back in Fort Erie, appellant and Lloyd Miller put Mr. Prashad's luggage in their car and then, after being refused entry at the Peace Bridge, entered the United States at Niagara Falls and went to the bus terminal in Buffalo, after asking directions (211, 214). While looking for Mr. Prashad, to deliver his baggage, they were arrested by Immigration Officers sometime after 6:30 a.m. (148, 215).



In exchange for his testimony against Mr. Wishart, the appellant, Prashad was given immunity from prosecution and was allowed to voluntarily depart the Country without being deported (84-87).

In exchange for his testimony, Lloyd Miller, although deported, was allowed to plea to the misdemeanor of having conspired with the appellant to obtain the entry of Mr. Prashad into the U.S. in violation of 8 U.S.C. §1325 and 18 U.S.C. §371 (see Information, U.S. v. Miller, Cr. No. 77-9, A - 9).<sup>\*</sup> Miller was promised a sentence of time served, slightly more than five weeks (262).

Appellant, also having been deported, and also having spent more than five weeks in jail before release on bail was not offered a plea to this lesser offense and stood trial (262).

At the conclusion of evidence the defendant requested that the jury be instructed on the lesser offense to which Miller had already pled (Defendant's Request No. 1 A-11 ). This request was denied (332, 339).

Count III of the indictment was dismissed on motion (324). The jury acquitted on a charge of assaulting or resisting an Immigration Officer (18 U.S.C. §111). Appellant was convicted on Counts I and II of the indictment charging conspiracy (18 U.S.C §371) and a violation of 8 U.S.C. §1324(a)(1). He was sentenced to a term of imprisonment of 15 months, which he is now serving.

---

<sup>\*</sup>This Information charged precisely the same overt acts as the indictment against appellant.

POINT I

THE REFUSAL OF THE TRIAL COURT  
TO INSTRUCT ON THE LESSER INCLUDED  
OFFENSE WAS ERROR.

A defendant is entitled to an instruction on a lesser included offense if:

(1) A proper request is made; (2) The elements of the lesser offense are identical to part of the elements of the greater offense; (3) There is some evidence which would justify conviction of the lesser offense; (4) The proof on the element or elements differentiating the two crimes is sufficiently and dispute so that the jury may consistently find the defendant innocent of a greater and guilty of the lesser included offense; and (5) There is mutuality, i.e., a charge may be demanded by either the prosecution or the defense. (U.S. v. Thompson, 492 F.2d 359, 362 (8th Cir. 1974); U.S. v. Brown, 551 F.2d 236, 239 (1977).

Cf. U.S. v. Whitaker, 144 U.S. at App. D.C. 344 (1971); U.S. v. Brischetto, 538 S.2d 208, 209 (8th Cir. 1976).

(1) In this case a proper request was made. (See Defendant's Request to Charge, no. 1 A-11).

(2) The elements of the lesser offense are identical to part of the elements of the greater offense.

Section 1325 of Title 8 U.S.C. makes unlawful the entry of an alien into the United States, inter alia, by a willfully false or misleading representation. (Text of statute infra, at p. 14).

Section 1324 of Title 8 makes it unlawful for any person to bring into the United States any alien whose entry is



not lawful under the terms of Chapter 12 of Title 8 (which includes §1324) or any other law relating to the immigration of aliens. (See text of §1325 infra at p. 14 ).

Thus a prosecution under §1324(a)(1) for bringing into the United States an alien who enters unlawfully by means of a willfully false representation (e.g. presentation of Lloyd Miller's landing card) includes all the elements of that lesser offense under §1325, i.e., (a) entry, (b) of an alien, (c) by willfully false representation. Obviously, the elements for both are not the same since the element of "bringing" an alien contained in §1324 is absent in §1325, which is directed at the alien himself.

It follows apodictically that a conspiracy (18 U.S.C. §371) to bring an alien into the United States by the unlawful means above in violation of §1324, includes all the elements of a conspiracy to obtain the entry of an alien into the U.S. by the same unlawful means in violation of §1325.\*

In a case where some of the elements of the crimes charged themselves constitute a lesser crime, the defendant, if the evidence justifies it, would no doubt be entitled to an instruction which would permit a finding of guilt on the lesser offense. (Berra v. U.S., 351 U.S. 134, 137 (1956)).

(3) There is evidence that would justify conviction of the lesser offense.

It may be simply noted that if the evidence justified the co-defendant Mr. Miller's plea to the lesser offense, it

---

\*This latter language was contained in the original complaint against Miller and Wishart, (A-4).

must, by parity of reasoning, justify conviction of Mr. Wishart, the appellant for the same offense.

However, directly analyzed, the evidence is more than sufficient to justify the conviction of the defendant of participation in a conspiracy which had as its object the illegal entry of Harri Prashad into the United States. The unlawful agreement was established by the testimony of Prashad and Miller; the purpose clearly was the entry of Prashad into the United States; the entry was intended to be unlawful by means of the false representations contained in the presentation of Miller's Canadian Immigration Document; all overt acts except no. 4 were established by more than one witness.

The evidence was manifestly sufficient.

(4) The jury could have consistently found the defendant innocent of the greater charge, but guilty of the lesser included offense.

Although the lesser offense must be included within the greater offense, it may not on the facts of the case be coextensive with the greater offense, with identical factual issues to be resolved. Berra v. U.S., supra, at 135; Sansone v. U.S., 380 U.S.343, 350 (1964). In speaking about this fourth requirement the 8th Cir. stated:

This requirement is intended to prevent the jury from capriciously convicting on the lesser offense when the evidence requires either conviction on the greater offense or outright acquittal. (U.S. v. Brown, 551 F.2d at N. 4)



As stated by this Court in U.S. v. Harary,  
457 F.2d 471, 478 (2d Cir. 1972):

The jury is not given carte blanche to find the defendant guilty of only the lesser offense when such guilt necessarily establishes guilt of the greater offense.

Turn to the facts of this case. The distinguishing factual element between the violations of §1324 and §1325 of 8 U.S.C. is the "bringing" of the alien into the United States. Correlatively, the distinguishing fact with respect to conspiracy to violate these statutes derives from whether the particular conspiracy had as its object the actual bringing of Harri Prashad into the United States. Clearly then, this is not a case where the establishment of the guilt of the appellant for the lesser offense "necessarily establishes guilt of the greater offense."

Moreover, several statements attributed to the appellant indicate the more limited purpose for this conspiracy. Prashad recalled, and testified:

[Wishart] told me he would arrange to use the landing slip of a very good friend he has and I can pass with that.

Miller testified that the appellant had said, "the car broke down . . . . Harri has gone across to the States." These statements are susceptible of a reasonable inference that neither the plan of the conspiracy nor its implementation contemplated the actual transporting of Mr. Prashad into the United States by the appellant or any other member of the conspiracy.

The only evidence tending to show that the appellant actually brought Prashad into the United States was the testimony of Prashad himself. The jury had been given ample reason to doubt the credibility of his testimony and the credibility of his denial that bus arrangements had been made for his border crossing.

First, this prime instigator of the entire enterprise was being given complete immunity in exchange for his testimony; he knew his testimony was directed specifically toward the crime of bringing people into the United States (63).

Second, in addition to the lie revealed by Prashad's letter to the appellant's wife, concerning his motivation for coming to the United States (see, ante, Statement of Facts p.2 at \*) that same letter reveals a definite mental instability on the part of Prashad:

. . . Many times I feel that I will go mad  
For long hours I can't think straight. I  
know one day I will be completely insane  
because the signs are there and I have the  
feelings. As you can see, I have not put  
an address because of a lot of reasons  
which I will explain, but not before the  
case on the 22nd. A close watch is placed  
on me. . . . So you see how I don't have  
any luck. My mind is too soft. . . .  
I'm thinking seriously of committing  
suicide because I am practically a madman,  
too much worries. . . . They all charge  
collect to your phone. . . . I can't think  
straight, my mind is corrupt. . . . My mind  
is weak, if I don't see a doctor, I will be  
mad pretty soon. All I have now is gone,  
lost, no money, nothing. That is the result  
of disobedience to parents and opposition  
from anybody you trust and have a good mind  
for. . . . (74-76).



The portion of Prashad's testimony holding that the appellant had transported him across the border was the only part of his testimony concerning the appellant which was not corroborated. Especially in light of the proper instructions given to the jury concerning the weighing of testimony by witnesses who are found to have testified falsely (426), and the testimony of accomplices (427), the jury could have reasonably disbelieved all of Prashad's testimony, except that corroborated by other evidence (Cf. 336). The jury would have had reason to doubt, therefore, that the appellant actually transported Prashad, who could have walked, hitchhiked, or taken a commercial carrier across the border.

Thus, the requirement

that the jury could rationally conclude that the defendant was guilty of the lesser but not the greater offense

has been met. U.S. v. Seijo, 537 F.2d 694 (2d Cir. 1976);

U.S. v. Crutchfield, 547 F.2d 496 (9th Cir. 1977).

In Crutchfield, the element which distinguished the greater offense was specific intent and the 9th Circuit stated:

In order to properly deny an instruction on a lesser-included offense in a bribery case such as this one, the trial court must be able to say that a jury finding of no specific intent would be irrational. To do this, the Court must not only review the evidence to ascertain if there is an actual conflict in the evidence presented at the disputed element, but it must also "appraise all the testimony and evidence to determine whether it is capable of more than one reasonable inference."

U.S. v. Comer, 137 U.S. App. D.C. 214,  
421 F.2d 1149, 1154 (1970) (547 F.2d at  
500.) (emphasis added).

Similarly, it could not have been said in this case that a jury would be irrational in acquitting the defendant of the greater offense, while convicting him of the lesser. Thus, the trial court erred in refusing the instruction\*

(5) There is mutuality.

The trial court having held the evidence sufficient to allow Counts I and II to be submitted to the jury, the prosecution as well as the defense should have been entitled to and instruction on the lesser included offense.

---

\*It may be that the element of "bringing" is not even established by the government's proof. Although not argued below, the element of "bringing" contained in §1324(a)(1) has been held to cover mainly surreptitious bringing into the U.S. without submission of the alien to inspection by Immigration Officials; the statute is not directed to the situation in this case where the alien himself actually submits to examination by Immigration and Customs Officials. McFarland v. U.S., 19 S.2d 805 (6th Cir. 1927); U.S. v. Washington, 471 S.2d 402 (5th Cir. 1973).



CONCLUSION

All the requirements for an instruction on the lesser included offense of conspiracy to violate §1325 of Title 8 U.S.C. were satisfied. It was error for the trial court to deny the instruction; the judgment of conviction must be reversed and a new trial granted.

Respectfully submitted,

DOYLE, DIEBOLD, BIRMINGHAM,  
GORMAN & BROWN  
Office & Post Office Address  
1340 Statler Hilton Hotel  
Buffalo, New York 14202

MARK J. MAHONEY, ESQ. Attorney of Counsel  
(Attorney for Defendant-Appellant)

## STATUTES

### § 1324. Bringing in and harboring certain aliens; persons liable; authority to arrest

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

(b) No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

June 27, 1952, c. 477, Title II, ch. 8, § 274, 66 Stat. 228.

### § 1325. Entry of alien at improper time or place; misrepresentation and concealment of facts

Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than \$500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than \$1,000, or both.

June 27, 1952, c. 477, Title II, ch. 8, § 275, 66 Stat. 229.



APPENDIX





Pages

APPENDIX

|                                                                                       |      |
|---------------------------------------------------------------------------------------|------|
| Relevant Docket Entries. . . . .                                                      | A- 1 |
| Judgment and Commitment Order . . . . .                                               | 3    |
| Complaint - Magistrate's Docket 77-3M. . . . .                                        | 4    |
| Indictment - Cr. 77-9. . . . .                                                        | 6    |
| Information - U.S. v. Miller, Cr. 77-9 . . . . .                                      | 9    |
| Defendant's Request to Charge No. 1. . . . .                                          | 11   |
| Gov. Ex. 3 - Canadian Immigration<br>Identification Record ("Landing Card") . . . . . | 12   |
| Statutes                                                                              |      |
| 8 U.S.C. §§1324, 1325 . . . . .                                                       | 13   |
| Index to Record on Appeal. . . . .                                                    | 14   |
| Denial of Request to Charge. . . . .                                                  | *    |
| Charge of the Court. . . . .                                                          | **   |

\*Numbering as in Transcript - pp. 332-39.

\*\*Numbering as in original - pp. 390-437.

RELEVANT DOCKET ENTRIES

01/10/77      Filed Indictment

01/21/77      P.B.M. - Defendant enters plea of not guilty. Attorneys are directed to meet for voluntary discovery by 01/25/77 and motions are returnable on 01/31/77; Bail continued at \$10,000.

02/18/77      P.B.M - Oral argument on defendant's motion for discovery and bill of particulars - resolved. Discovery is complete.

03/15/77      Court was advised by counsel that no suppression hearing needed, the court set a new trial date of 05/23/77 for selection of jury that date at 2:00 p.m., with trial to follow on 05/24/77. Deft Miller executed consents for pre-plea probation report, to be furnished to the court on 04/07/77 and plea set for 04/11/77.

05/23/77      Case called to trial. Jury selected. Opening statements. Witnesses: Harri Pashad, David Mark Robinson. Trial adjourned to 05/24/77.

05/24/77      Trial resumes, jury enters. Witnesses: David Mark Robinson, Richard Mauer. Trial adjourned to 05/25/77.

05/25/77      Trial resumes, jury enters. Witnesses: Judith A. Gentles, Lloyd Howard Miller, Norman G. Wiltsey, M. Joseph Granado. Court grants deft's motion to dismiss Count 3 but denies motions to dismiss other counts. Closing statements by counsel, court charges the jury. Jury leaves to begin deliberation. Jury enters and reports verdict as follows: the jury finds Deft. Gormanston Wishart guilty on Counts One and Two, and not guilty on Count Four. The jury was polled at the request of deft. and discharged. Court continues bail as previously set, sentencing set for July 11, 1977.

07/11/77      Court sentenced deft. on Count One to the custody of the Attorney General for a period of 15 months and deft. to be credited for time served, and on Count Two sentenced to the custody of the Attorney General for a period of 15 months and defendant to be credited for time served, sentences are to be concurrent.  
Court advised that Notice of Appeal is to be filed



07/11/77 within ten days, defendant to present motion  
(con't) for new trial and any extension of time to  
appeal.

07/15/77 Filed Judgment and commitment. Commitment  
issued.

07/21/77 Filed Deft's Notice of Appeal.

07/21/77 Filed Motion for Release pursuant to Rule 9.  
Motion dtd 07/20/77. (Order denied, ELFVIN,  
J., 07/22/77) (xerox copy to Atty. Mahoney  
& U.S. Atty.)

07/22/77 Copy of notice of appeal, docket entries,  
financial affidavit and form A mailed to  
CCA, and U.S. Attorney.

United States of America vs.

United States District Court for

DEFENDANT

GORMANSTON WISHART

WESTERN DISTRICT OF NEW YORK

DOCKET NO. CR. 77-9

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date

MONTH DAY YEAR  
July 11, 1977

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Mark Mahoney, Esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

FINDING & JUDGMENT

There being a ~~not guilty~~ verdict of ☒ NOT GUILTY, ~~on Count Four.~~  
☒ GUILTY, on Counts One and Two.

Defendant has been convicted as charged of the offense(s) of conspiracy to unlawfully bring an alien into the United States, in violation of Title 18, U.S.C., Section 371 (Count 1); unlawfully bring an alien into the United States, in violation of Title 8, U.S.C., Section 1324(a)(1) (Count 2).

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby ~~sentenced to the custody of the Attorney General for a period of fifteen months and defendant to be credited for time served, and on Count Two sentenced to the custody of the Attorney General for a period of fifteen months and defendant to be credited for time served, sentences are to be concurrent.~~

sentenced as follows: Court sentenced defendant on Count One to the custody of the Attorney General for a period of fifteen months and defendant to be credited for time served, and on Count Two sentenced to the custody of the Attorney General for a period of fifteen months and defendant to be credited for time served, sentences are to be concurrent.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

JOHN T. ELFVIN, U.S. District Judge

Date July 11, 1977

A-3



# United States District Court FOR THE

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v

GORMANSTON AUGUSTUS WISHART

LLOYD HOWARD MILLER

Magistrate's Docket No. 77

Case No. 371

COMPLAINT for VIOLATION of

U.S.C. Title 8 18

Section 1324 (a)(1) 371

BEFORE EDMUND F. MAXWELL  
Name of MagistrateU.S. COURT HOUSE, BUFFALO, NEW YORK  
Address of Magistrate

The undersigned complainant being duly sworn states:

That on or about January 7, 1977, at Buffalo, New York

in the

Western District of New York

(1) GORMANSTON AUGUSTUS WISHART and LLOYD HOWARD MILLER

did<sup>(1)</sup> wilfully, knowingly and unlawfully combine, conspire, confederate and agree together with Harry Prashad, an alien not lawfully entitled to enter the United States, named as co-conspirator but not as defendant herein, to commit an offense against the United States, to wit, effect the illegal entry into the United States of said Harry Prashad, in violation of 8 USC 1324 (a)(1), all in violation of Title 18 USC 371.

In furtherance of the conspiracy and to effect the objects thereof, the defendants and co-conspirator performed the following overt acts: (See attached)

And the complainant states that this complaint is based on the report of the investigation done by Border Patrol Agents Richard P. Mauer and David M. Robinson, which report was prepared in the regular course of their investigative duties and which report states that the defendants herein and the co-conspirator herein applied for admission to the United States at the Peace Bridge, Buffalo, New York and at the Rainbow Bridge, Niagara Falls, New York on January 8, 1977. The complaint is further based on a written statement given to Border Patrol Agents Richard P. Mauer and David M. Robinson by the co-conspirator Harry Prashad, wherein the co-conspirator told investigating officers that the defendant Gormanston Augustus Wishart gave him a Canadian Immigration Form 1000 issued to an individual other than the co-conspirator and advised the co-conspirator to tell the United States Immigration Authorities, if asked, that he was the individual represented in said Canadian Immigration document.

And the complainant further states that he believes that

are material witnesses in relation to this charge.

Alexander T. Szabo  
Anti-Smuggling Agent

Signature of Complainant

Sworn to before me, and subscribed in my presence, 19  
(Signed) Edmund F. Maxwell

Official Title

Edmund F. Maxwell  
United States Magistrate

(1) Insert name of accused.  
(2) Insert statement of the essential facts constituting the offense charged.

OVERT ACTS

1. On or about the 7th day of January, 1977, the defendants Gormanston Augustus Wishart and Lloyd Howard Miller, met the co-conspirator at Kitchener, Ontario, Canada and provided him with instructions for entering the United States by the use of false documents.

2. On or about the 7th day of January, 1977, the defendants Gormanston Augustus Wishart and Lloyd Howard Miller drove the co-conspirator Harry Prashad to the Peace Bridge, Buffalo, New York for the purpose of entering the United States.

3. On or about the 8th day of January, 1977, the defendant, Gormanston Augustus Wishart and the co-conspirator Harry Prashad entered the United States at the Peace Bridge, Buffalo, New York at which time the co-conspirator, Harry Prashad, presented to United States Immigration Authorities a Canadian Form IMM 1000, belonging to defendant Lloyd Howard Miller. The co-conspirator Harry Prashad, was thereafter transported by defendant Gormanston Augustus Wishart to the Greyhound Bus Terminal at Buffalo, New York where he surrendered the Canadian Form IMM 1000 to defendant Gormanston Augustus Wishart.

4. On or about the 8th day of January, 1977, defendants Gormanston Augustus Wishart and Lloyd Howard Miller entered the United States at the Rainbow Bridge, Niagara Falls, New York, bringing with them baggage and personal effects belonging to Co-conspirator Harry Prashad.

15 JANUARY 1977



# In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-VS-

GORMANSTON WISHART  
LLOYD H. MILLER

MARCH 1976 Session ~~XXXX~~  
(Impanelled June 8, 1976)  
No.

Viol. Title 8, U.S.C.,  
Sections 1324(a)(1)  
and (4)  
Title 18, U.S.C.,  
Sections 2, 111, 371  
and 1114

## COUNT I

The Grand Jury Charges:

That beginning on or about the 7th day of January 1977 and continuing through the 8th day of January 1977, in the Western District of New York and elsewhere the defendants GORMANSTON WISHART and LLOYD H. MILLER did unlawfully combine, conspire and agree together with each other and with Harri Prashad, named herein as a co-conspirator but not a co-defendant, to commit an offense against the United States, to wit, to violate Title 8, United States Code, Section 1324(a)(1), by unlawfully bringing Harri Prashad into the United States; in violation of Title 18, United States Code, Section 371.

## OVERT ACTS

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about the 7th day of January 1977, the defendant GORMANSTON WISHART met with Harri Prashad at a residence in Kitchener, Ontario.

2. On or about the 7th day of January 1977, the defendants GORMANSTON WISHART and LLOYD H. MILLER travelled from Kitchener, Ontario to Fort Erie, Ontario.

3. On or about the 8th day of January 1977, the defendant GORMANSTON WISHART rented a room at the Fort Villa Motel in Fort Erie, Ontario.

4. On or about the 8th day of January 1977, the defendant LLOYD H. MILLER gave Canadian Immigration Identification Record No. G6341602 to the defendant GORMANSTON WISHART in Fort Erie, Ontario.

5. On or about the 8th day of January 1977, the defendant GORMANSTON WISHART drove an automobile across the Peace Bridge in Buffalo, New York with Harri Prashad.

6. On or about the 8th day of January 1977, the defendants GORMANSTON WISHART and LLOYD H. MILLER travelled from Niagara Falls, New York to the Greyhound Bus Station in Buffalo, New York.

COUNT II

The Grand Jury Further Charges:

That on or about the 8th day of January 1977 at the Peace Bridge, Buffalo, New York, in the Western District of New York, the defendant GORMANSTON WISHART unlawfully did bring into the United States by means of an automobile Harri Prashad, an alien not lawfully entitled to enter or reside within the United States; in violation of Title 8, United States Code, Section 1324(a)(1).

At the time and place aforesaid, the defendant LLOYD H. MILLER did aid, abet, counsel, command, induce and procure the offense alleged herein; in violation of Title 8, United States Code, Section 1324(a)(1) and Title 18, United States Code, Section 2.



COUNT III

The Grand Jury Further Charges:

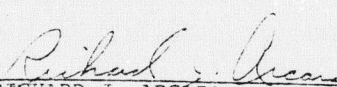
That on or about the 8th day of January 1977 at the Peace Bridge, Buffalo, New York, in the Western District of New York, the defendant GORMANSTON WISHART did willfully and knowingly encourage the entry into the United States of Harri Prashad, an alien not lawfully entitled to enter or reside within the United States; in violation of Title 8, United States Code, Section 1324(a)(4).

At the time and place aforesaid, the defendant LLOYD H. MILLER did aid, abet, counsel, command, induce and procure the offense alleged herein; in violation of Title 8, United States Code, Section 1324(a)(4) and Title 18, United States Code, Section 2.

COUNT IV

The Grand Jury Further Charges:

That on or about the 8th day of January, 1977, in Buffalo, New York, in the Western District of New York, the defendant GORMANSTON WISHART did forcibly assault, resist, oppose, impede, intimidate and interfere with David M. Robinson, an Immigration Officer, while the said officer was engaged in the performance of his official duties; in violation of Title 18, United States Code, Sections 111 and 1114.

  
RICHARD J. ARCARA  
United States Attorney

A TRUE BILL:

\_\_\_\_\_  
Foreman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

-v-

LLOYD H. MILLER,

Defendant

CR. NO. 77-9

I N F O R M A T I O N

(Vio. T. 18, U.S.C., Section 371  
and T. 8, U.S.C., Section 1325)

The United States Attorney Charges:

*Filed  
4/11/77  
3:10 pm  
JSE*

That beginning on or about the 7th day of January, 1977, and continuing through the 8th day of January, 1977, in the Western District of New York and elsewhere the defendant LLOYD H. MILLER did unlawfully combine, conspire and agree together with Gormanston Wishart, named herein as a co-conspirator but not a co-defendant, to commit an offense against the United States, to wit, to violate Title 8, United States Code, Section 1325, by unlawfully obtaining the entry into the United States of Harri Prashad, an alien, by willfully false and misleading representations to Immigration officers; all in violation of Title 18, United States Code, Section 371.

OVERT ACTS

At the times hereinafter mentioned, the defendant and co-conspirator committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about the 7th day of January 1977, Gormanston Wishart and LLOYD H. MILLER travelled from Kitchener, Ontario to Fort Erie, Ontario.

2. On or about the 8th day of January 1977, Gormanston Wishart rented a room at the Fort Villa Motel in Fort Erie, Ontario.

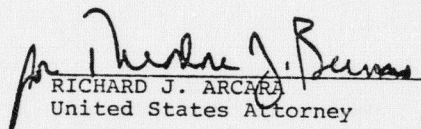


3. On or about the 8th day of January 1977, the defendant LLOYD H. MILLER gave Canadian Immigration Identification Record No. G6341602 to Gormanston Wishart in Fort Erie, Ontario.

4. On or about the 8th day of January 1977, Gormanston Wishart drove an automobile across the Peace Bridge in Buffalo, New York with Harri Prashad.

5. On or about the 8th day of January 1977, Gormanston Wishart and LLOYD H. MILLER travelled from Niagara Falls, New York to the Greyhound Bus Station in Buffalo, New York.

DATED: Buffalo, New York, March 15, 1977.

  
RICHARD J. ARCARA, Asst. U.S. Attorney  
United States Attorney

Request No. /

Resisting Arrest (18 U.S.C. §111)

The Defendant requests the Court to instruct the jury  
on the crime of conspiracy to violate §1325 of Title 18 U.S.C.

*denied.*

A-11



CANADIAN IMMIGRATION  
IDENTIFICATION RECORD  
CARTE D'IDENTITÉ  
D'IMMIGRATION CANADA

G 6341602

AC MODE OF TRAVEL MODE DE TRANSPORT  
Toronto Int'l Airport  
28 Oct. '72 - NI  
AFL 23 May '73

|                                                     |  |                                                                                                                                 |  |                                                        |
|-----------------------------------------------------|--|---------------------------------------------------------------------------------------------------------------------------------|--|--------------------------------------------------------|
| FAMILY OR LAST NAME NOM DE FAMILLE<br><b>MILLER</b> |  | GIVEN NAMES PRENOMS<br><b>Lloyd Howard</b>                                                                                      |  | SEX - SEXE<br>M 2F 1                                   |
| DATE OF BIRTH DATE DE NAISSANCE<br>0 4 0 4 3 9      |  | PLACE OF BIRTH LIEU DE NAISSANCE<br><b>Clarendon</b>                                                                            |  | COUNTRY OF BIRTH PAYS DE NAISSANCE<br><b>Jamaica</b> 6 |
| CITIZEN OF CITIZEN DE<br><b>Jamaica</b>             |  | MARITAL STATUS ETAT MATRIMONIAL<br>1 SINGLE CÉLIBATAIRE 2 MARRIED MARIÉ 3 WIDOWED VEUF<br>4 DIVORCED DIVORCÉ 5 SEPARATED SÉPARÉ |  | 2                                                      |

No

|                                                                           |           |                                |                                                                                                                                                         |  |
|---------------------------------------------------------------------------|-----------|--------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| ACCOMPANYING FAMILY MEMBERS - MEMBRES DE LA FAMILLE QUI VOUS ACCOMPAGNENT |           |                                | NAME, ADDRESS, RELATIONSHIP OF CLOSEST RELATIVE OUTSIDE OF CANADA<br>NOM, ADRESSE, DU PLUS PROCHE PARENT A L'EXTERIEUR DU CANADA                        |  |
| NAME - NOM                                                                | AGE - ÂGE | RELATIONSHIP - LIEN DE PARENTE | <b>GEOFF MILLER (FATHER)</b><br><b>PEDRU RIVER BENSON - TAMPPO.</b><br><b>PAUL H. JAMAICA</b>                                                           |  |
|                                                                           |           |                                | I CERTIFY THAT MY ANSWERS TO THESE QUESTIONS ARE TRUE AND CORRECT<br>JE CERTIFIE QUE MES RÉPONSES À CES QUESTIONS SONT EXACTES ET CONFORMES À LA VÉRITÉ |  |
|                                                                           |           |                                | SIGNATURE <i>[Signature]</i>                                                                                                                            |  |

|                                                                                                             |                                                                   |                                                                                                        |                                                                         |                                                                                       |                                                    |
|-------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------|---------------------------------------------------------------------------------------|----------------------------------------------------|
| IMMIGRATION CATEGORY (O-I-C) Waiver<br>CATEGORIE D'IMMIGRANT 4.88                                           |                                                                   | COUNTRY OF LAST PERMANENT RESIDENCE<br>PAYS DE DERNIÈRE RESIDENCE PERMANENTE<br><b>Jamaica</b>         |                                                                         | SOURCE AREA<br>EN PROVENANCE DE<br>6 0 2                                              | NATIONAL - RESSORTISSANT<br>YES 10UI NO 2 NON<br>1 |
| LANGUAGE - LANGUE<br><b>English</b>                                                                         |                                                                   | PASSPORT NO. - NO DU PASSEPORT<br><b>463728</b>                                                        |                                                                         | COUNTRY OF ISSUE - PAYS DE DELIVRANCE<br><b>Jamaica</b><br>10 Aug. 1971 - 9 Aug. 1976 |                                                    |
| YEARS OF SCHOOLING<br>D'ÉTUDES<br>1 2                                                                       | UNIVERSITY GRADUATE<br>DIPLOME D'UNIVERSITÉ<br>YES 1 0UI NO 2 NON | YEARS OF VOCATIONAL / TECHNICAL TRAINING<br>FORMATION PROFESSIONNELLE ET TECHNIQUE<br>2                | 0 0                                                                     | YEARS OF APPRENTICESHIP<br>ANNÉES D'APPRENTISSAGE<br>0 0                              | 0 0                                                |
| INTENDED OCCUPATION - EMPLOI PRÉVU<br><b>Machine-tool set-up operator</b>                                   |                                                                   | 8 3 1 3 1 4 6                                                                                          | YEARS IN INTENDED<br>OCCUPATION<br>ANNÉES DANS<br>L'EMPLOI PRÉVU<br>0 1 | SKILL CODE<br>CODE<br>PROFESSIONNEL<br>0 4                                            |                                                    |
| MESSAGE PAID BY<br>AP WARRANT NUMBER<br>MESSAGE PAYÉ PAR<br>OU SOV D'INDÉMNITÉ DE PASSAGE NO<br><b>Self</b> |                                                                   | AMOUNT OF MONEY TO BE<br>TRANSFERRED TO CANADA<br>SOMME D'ARGENT À<br>TRANSFÉRER AU CANADA<br><b>S</b> |                                                                         | <b>Nil 00</b>                                                                         |                                                    |

|                                                           |  |                                                                                                                                                                   |  |
|-----------------------------------------------------------|--|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| AT DESTINATION - AU LIEU DE DESTINATION<br><b>as in B</b> |  | B PERSON WILLING TO ASSIST - PERSONNE OFFRANT SON AIDE<br><b>Pearlina Miller (wife)</b><br><b>105 Onward Avenue, Apartment 401,</b><br><b>Kitchener, Ontario.</b> |  |
|-----------------------------------------------------------|--|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|

|                                                                  |  |                                                                     |  |
|------------------------------------------------------------------|--|---------------------------------------------------------------------|--|
| VISA OR LETTER OF PRE EXAMINATION - VISA OU LETTRE DE PRÉ-EXAMEN |  | OFFICE OF ISSUE - BUREAU DE DELIVRANCE<br><b>Kitchener, Ontario</b> |  |
| NUMBER - NUMÉRO                                                  |  | 3 4 5 3                                                             |  |

|                                                                                             |  |                                                                           |  |                                                                   |  |
|---------------------------------------------------------------------------------------------|--|---------------------------------------------------------------------------|--|-------------------------------------------------------------------|--|
| DATE OF ISSUE - DATE DE DELIVRANCE<br>D J M Y A                                             |  | VALID UNTIL - VALIDE JUSQU'AU                                             |  | SIGNATURE OF VISA OFFICER - SIGNATURE DE L'AGENT DES VISAS        |  |
| LOCAL NO AND CATEGORY - NO DE LA FICHE ET DE LA CAT. MEDICALES<br><b>60-85-53390 Passed</b> |  | DATE OF MED. ASSES. - DATE DE L'APPR. MÉDICALE<br><b>October 25, 1973</b> |  | MED. SURV. REQ. SURV. MÉDICALE REQUISE<br>YES 1 0UI NO 2 NON<br>2 |  |

|                                                                                                                                                                     |  |                                                                                             |  |                                                                           |  |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|---------------------------------------------------------------------------------------------|--|---------------------------------------------------------------------------|--|
| TRANSPORTATION FROM PORT OF ENTRY<br>TRANSPORT DU PORT D'ENTRÉE<br><b>private auto</b>                                                                              |  | MONEY IN POSSESSION - ARGENT LIQUIDE<br><b>S 270.00</b>                                     |  | ADMITTED AS - ADMIS COMME<br>IMMIGRANT - LANDED ON<br>IMMIGRANT - REÇU LE |  |
| REMARKS - OBSERVATIONS<br><b>Kitchener file: 3458-25423</b><br><b>HQ file: HQ2-7800-11826</b><br><b>I-C Waiver d/30/5/74 - P.C. 1974-1231</b><br><b>under 28(1)</b> |  | SIGNATURE OF IMMIGRATION OFFICER - SIGNATURE DE L'AGENT D'IMMIGRATION<br><i>[Signature]</i> |  | D J M Y A<br>1 0 0 7 7 4                                                  |  |

|                                                                                            |  |         |  |
|--------------------------------------------------------------------------------------------|--|---------|--|
| NAME OF OFFICE AND CODE NO. - NOM ET CODE NUMÉRIQUE DU BUREAU<br><b>Kitchener, Ontario</b> |  | 3 4 5 8 |  |
|--------------------------------------------------------------------------------------------|--|---------|--|

THIS FORM IS EVIDENCE OF YOUR STATUS IN CANADA. ALWAYS PRESENT IT ON THE OCCASION OF ANY VISIT TO A CANADA MANPOWER CENTRE OR  
LA PRÉSENTE CARTE EST LA PREUVE DE VOTRE STATUT AU CANADA. VEUILLEZ TOUJOURS LA PRÉSENTER LORSQUE VOUS VOUS RENDEZ À UN  
CENTRE DE MAIN-D'ŒUVRE DU CANADA OU À UN CENTRE D'IMMIGRATION DU CANADA.

THIS FORM HAS BEEN PRESCRIBED BY THE MINISTER OF MANPOWER AND IMMIGRATION  
FORMULAIRE PRÉSCRIT PAR LE MINISTRE DE LA MAIN-D'ŒUVRE ET DE L'IMMIGRATION

REDUENT S'UNIQUE  
POUR LE RÉSIDENT

A-12

13



## STATUTES

### 8 § 1324. Bringing in and harboring certain aliens; persons liable; authority to arrest

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

(b) No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

June 27, 1952, c. 477, Title II, ch. 8, § 274, 66 Stat. 228.

### 8 § 1325. Entry of alien at improper time or place; misrepresentation and concealment of facts

Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than \$500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than \$1,000, or both.

June 27, 1952, c. 477, Title II, ch. 8, § 275, 66 Stat. 229.

A-13



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

---

UNITED STATES OF AMERICA,  
Plaintiff,

-vs-

Cr. 77-9  
C.A. No. 77-1329

INDEX TO RECORD ON APPEAL

GORMANSTON WISHART,  
Defendant-Appellant

---

1. Judgment and Commitment Order, 7-11-77.
2. Temporary Commitment.
3. Complaint, Magistrate Docket No. 77-3M.
4. Indictment.
5. Court Exhibit A (amended indictment).
6. Defendant's Motion pursuant to Rules 7, 16 F.R.Cr.P.
7. Government's Response to Motion.
8. Defendant's Request to Charge.
9. Defendant's Motion for Release, Rule 9 F.R.Cr.P.
10. Information, U.S. v. Miller, Cr. No. 77-9.
11. Government's Request to Charge.
12. Government's Supplemental Request to Charge.
13. Government Exhibit 3, Canadian Immigration Identification Record for Lloyd Miller.
14. Government Exhibit 4, Copy of Passport -- Gormanston Wishart.
15. Government Exhibit 7, Advice of Rights Form.
16. Government Exhibit 7A, Advice of Rights Form -- Top only.
17. Government Exhibit 9 -- Notice of Refusal of Admission Form.
18. Government Exhibit 9A -- Notice of Refusal of Admission Form (original).
19. Government Exhibit 10 -- Motel Registration Form.
20. Defendant's Exhibit 1 Letter, Harry Prashad -- Mrs. Wishart 3-4-77.

1 conspiracy and it will be given in that regard  
2 in substance. 13 is all right. 14 is all  
3 right. 15 is all right. 16 is all right and  
4 will be in in substance. 17 is all right. 18  
5 is all right. 19 all right. 20 all right.  
6 21 all right, it will be given in substance.  
7 The supplemental request is out. Defendant's  
8 request Number 1 I have denied. The only thing  
9 I would say relative to that, if you wanted me  
10 to, is to indicate that the conspiracy which  
11 is talked about in the superseding information  
12 is the same type of animal of crime that I am  
13 defining for them in connection with Count 1.  
14 I wouldn't go any farther than that.

15 MR. MAHONEY: I feel the defendant is entitled -- I believe  
16 that is a lesser included offense, and I feel  
17 that the defendant is entitled to it, not only  
18 simply as a matter of law and on the facts of  
19 the case, but also because the co-defendant  
20 pled to the same charge, and the charge to  
21 which he pled incorporate the same --

22 THE COURT: I talk about this not as a lesser included  
23 charge, I say --

24 MR. MAHONEY: The same overt acts were charged with Mr. Miller  
25 in his information, I believe that is the lesser



1 included offense.

2 MR. BURNS: I think under Rule 31(c) of the Federal Rules of  
3 Criminal Procedure, the Court should properly  
4 instruct, if there is a necessarily included  
5 offense, I think is the phrase used in the  
6 Federal Law, I think the authority of Sansone  
7 versus United States, a copy of which I have  
8 provided the Court and Mr. Mahoney, and also  
9 United States versus Harari, Second Circuit  
10 Case, that the situation of this case is such  
11 that a lesser or a necessarily included offense  
12 would not be appropriate. Specifically Sansone  
13 and Harari require that a lesser included or  
14 necessarily included offense instruction is only  
15 proper where the charged greater offense re-  
16 quires the jury to find a "disputed factual  
17 element" which is not required for conviction of  
18 the lesser included offense, and I think that  
19 unless Mr. Mahoney has some disputed factual  
20 element that he thinks the jury should consider,  
21 that the facts in this case simply do not warrant  
22 a necessarily included charge. I should say  
23 also that in my research I could not find any  
24 cases on this point as to whether or not a con-  
25 spiracy to violate Section 1325 is a necessarily

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

1 included offense encompassed by conspiracy to  
2 violate Section 1324. I haven't found any cases  
3 either way on that point.

4 MR. MAHONEY: Well, I think --

5 THE COURT: The thing that -- my clerk obviously looked at  
6 this, and he tells me that he cannot visualize  
7 or countenance a conspiracy to violate Section  
8 1325 or subsequently a violation of 1325 as  
9 falling within a violation of Section 1324(a)(1),  
10 indicating that the latter envisions bringing  
11 someone into the country who is not entitled  
12 to come in, whereas Section 1325 would be a  
13 charge lodged against the alien himself for  
14 entering the country illegally. Now, frankly,  
15 he doesn't consider the aspect of conspiracy.

16 MR. MAHONEY: I think especially if one reads the information --

17 THE COURT: The information really tracks 1324 rather than  
18 25 if what my clerk tells me is true, because  
19 it says, "To commit an offense against the United  
20 States by unlawfully obtaining the entry into  
21 the United States of Harri Prashad, an alien."  
22 The conspiracy is only with Wishart. That is  
23 a refinement that had not yet caught my mind.

24 MR. BURNS: If the Court reads it that way, that reinforces  
25 the Government's argument that there is no dis-



1                   puted --

2       THE COURT:

3                   I understand. The only thing that bothers me,  
4                   and it is nothing that has pertinence to what  
5                   we are doing here, it more bothers me about the  
6                   plea of guilty of Mr. Miller to the information.  
7                   I know what was in my mind, and in the inter-  
8                   rogation of Mr. Miller, which Mr. Noel read to  
9                   us earlier, that occurred on April 11th, what  
10                  I got out of Mr. Miller was somewhat skinny,  
11                  but I thought sufficient relative to his parti-  
12                  cipation with Mr. Wishart in obtaining the  
13                  entry of Prashad, and whether or not that is a  
14                  1325 violation or a 1324(a)(1), I don't know.  
15                  That is something that doesn't concern us right  
                  now.

16       MR. MAHONEY:

17                  The charge of 1325 is entering the -- as you  
18                  know -- is entering the United States by willful-  
19                  ly false or misleading representation, concealment  
20                  of a material fact. I think that will apply to  
21                  Mr. Prashad, as far as his presentation of the  
22                  papers of Mr. Miller, and I don't see any  
23                  problems that the Government could overcome  
24                  if they went to trial on that charge with Mr.  
25                  Wishart, as far as conspiring with Mr. Prashad  
                  to commit that offense and doing the overt acts

1 in furtherance of that, precisely as were alleged  
2 against Mr. Miller. What that charge does not  
3 involve, in which is involved in the conspiracy  
4 charge and the 1324 charge pending against Mr.  
5 Wishart in the present case, as it stands now,  
6 is the actual bringing into the country Mr.  
7 Prashad, which is only established by the test-  
8 mony of Mr. Prashad himself, which is disputed.  
9 Certainly I don't think Mr. Burns contends that  
10 it is necessary for the defendant to take the  
11 stand and deny that any more than simply to make  
12 it a disputed fact within the meaning of the  
13 Sansone case, because in Sansone they stated  
14 the only issue at trial was whether the peti-  
15 tioner's act was willful, and not whether there  
16 was a failure to file, and the differences be-  
17 tween the two charges in those cases -- or in  
18 that case had to do with the failure to file  
19 aspect of it, and so that the disputed facts  
20 had to do with willfulness. Apparently there  
21 must had been some stipulation or agreement or  
22 something, but I am sure it is not because the  
23 defendant didn't take the stand. So that in this  
24 case the issue of Mr. Wishart having brought Mr.  
25 Prashad into the country remains disputed, and

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK



1 it remains not something which is -- it cer-  
2 tainly is an issue at trial, which is not what  
3 was said in Sansone. The other case Mr. Burns  
4 cited was in the Second Circuit, Charles Harari,  
5 the defendant, a 1972 case, and in that case  
6 the prosecution was seeking a lesser charge and  
7 was resisted by the defense successfully by  
8 saying that there were disputed facts, which  
9 there were no disputed facts between the two  
10 charges, and I think that the defendant has --  
11 the question is -- the point is that the de-  
12 fendant is the one who has really sometimes the  
13 right to the lesser charge which should -- he  
14 should get the benefit of it and sometimes there  
15 are reasons to deny it to the Government, but  
16 I think always it should be more solicitous of  
17 the needs and the justice of things in giving  
18 it to the defense where it is advisable, and  
19 bearing in mind the co-defendant's situation  
20 in this case, and I think the jury should be  
21 given that to consider.

22 MR. BURNS:

I think that Harari also makes clear that there  
23 must be a truly disputed factual element, one  
24 which would provide "a rational basis for a  
25 verdict acquitting the defendant of the offense

1 charged and convicting him of the included of-  
2 fense," citing the Model Penal Code. I don't  
3 think with the state of the evidence in this  
4 case that a jury verdict would indeed be ration-  
5 al if they acquitted of the offense charged and  
6 convicted him of the 1325 charge, since the  
7 evidence really is identical. So I think Mr.  
8 Mahoney's argument boils down to one of equal  
9 treatment with Mr. Miller, since Mr. Miller was  
10 allowed to plead guilty to that, therefore Mr.  
11 Wishart should have the same opportunity. I  
12 submit to the Court that the evidence in this  
13 case should be submitted to the jury or the  
14 case should be submitted to the jury only on  
15 the Section 1324 conspiracy.

16 MR. MAHONEY: I disagree with that for the precise reason that  
17 Mr. Prashad the jury can choose to disbelieve.  
18 He is the only person -- the defendant having  
19 brought him across the border as opposed to hav-  
20 ing walked, run, taken the bus or anything like  
21 that. The other -- the thing which Mr. Miller  
22 adds which are not in that vein was that he  
23 had given the slip to Mr. Wishart, and that he  
24 denies knowing for what purpose, but that Mr.  
25 Prashad -- the jury could find Prashad got into



(Thereupon, an off the record discussion ensued at the bench.)

THE COURT: Ladies and gentlemen, my remarks, unfortunately, cannot be capsulized in just a few minutes, and as a consequence I am going to allow you to go downstairs for eight or so minutes and loosen up your legs before you come back. We'll have you back here and you can listen to my pearls of wisdom.

(Thereupon, the court was in recess at 4:35 P.M.)

(Proceedings resumed, pursuant to recess, commencing at 4:48 P.M.)

(Defendant present, counsel present, jury absent.)

MR. MAHONEY: Your Honor, I wish to enter an objection to your charging the jury at such a late hour in the day. I think it puts undue pressure on them. Their deliberations begin much later in the day, too much pressure on them to render a

1 verdict.

2 THE COURT: I will deny that and note for the record that  
3 this objection was made at 4:48 P.M.  
4

5 (Thereupon, jury entered the courtroom at  
6 4:50 P.M.)  
7

8 CHARGE OF THE COURT  
9

10 THE COURT: Now, ladies and gentlemen, I urge your  
11 close attention to what I am going to tell you,  
12 which are the instructions as to the law which  
13 are to govern your deliberations, and in so  
14 doing, I am making no attempt to convert you  
15 into attorneys, although at some points from the  
16 verbiage that I necessarily must employ, it  
17 would almost seem that I am doing that. Con-  
18 centrate on what I am saying and, as I will tell  
19 you at the conclusion, if you have any questions  
20 concerning it, there will be means whereby you  
21 can get later clarification.

22 Now, I and the attorneys have mentioned  
23 earlier that yours is the job of determining all  
24 the factual issues and, of course, the ultimate  
25 facts are the guilt or innocence of Mr. Wishart



1 on each of the counts that we have in the case,  
2 and I do not intend -- I don't think I'm going  
3 to be referring to any of the facts in the case  
4 as I go through this, but if I do, it will be  
5 merely for the purpose of illustrating or  
6 clarifying some point of the law, some point  
7 of instruction that I am giving to you. If I  
8 do make any such reference, do not take it as  
9 any indication of any feeling on my part that  
10 that is the way the facts line up. As the attor-  
11 neys have told you and as I have just mentioned  
12 to you, you are the ones who are going to be  
13 deciding what has been proven and how the  
14 factual issues are going to be decided. During  
15 the trial there were motions made from time to  
16 time and objections made by attorneys, and  
17 questions were asked of witnesses or objections  
18 made to the offer of particular documents, and  
19 once in a while, particularly as to a large  
20 segment of the testimony of Special Agent  
21 Granado, I struck out a segment of the evidence,  
22 and I told you to ignore it. Now, do not try  
23 to read into any of my actions on the motions  
24 or objections or striking out testimony any  
25 inference that I hold one view or the other.

1 Even if you think there is such a view on my  
2 part, just ignore it, because that is your  
3 chore to come to your own conclusion, and I  
4 have not intended to indicate any feeling one  
5 way or the other in the case and, as far as I  
6 can objectively determine, I have none. Now,  
7 you are to rely on your recollection of the  
8 evidence and, as I say, do not be influenced  
9 by any remarks that I or either of the attorneys  
10 has made.

11 The case is complicated slightly by the  
12 fact that you are given two types of crimes to  
13 be dealing with. In Count 1 of the indictment  
14 you are going to be dealing with charges that  
15 Mr. Wishart has been a member of a conspiracy  
16 which is unlawful. In Count 2 and Count 4 you  
17 are going to be dealing with what we call sub-  
18 stantive crimes, when the allegation is that  
19 Mr. Wishart did something illegally and, as I  
20 will tell you, there are two different types  
21 of charges. The main difference, and I will  
22 particularize this later, between the substantive  
23 crime and the crime of conspiracy is that with  
24 the conspiracy, it is the plan or the conspiracy  
25 itself to do the particular illegal act which



1 in criminal, not the actual doing of the illegal  
2 act, and when I speak of a substantive crime,  
3 as I do when I talk about Count 2 or Count 4,  
4 Count 2 being the charge that Mr. Wishart brought  
5 Mr. Prashad into the United States illegally  
6 in an automobile, and Count 4 where it is charged  
7 that Mr. Prashad resisted, and so forth, Mr.  
8 Robinson, who was an immigration officer, while  
9 Mr. Robinson was conducting his work. They are  
10 the substantive crimes, and that is the actual  
11 doing of an illegal act, and the rules that  
12 are applicable are quite different, and I am  
13 going to for the moment put aside Count 1, the  
14 conspiracy, and I'll deal with Count 4, and  
15 come back to the conspiracy count later. You  
16 will have the indictment with you in the jury  
17 room. As I told you, I have blocked out what  
18 was Count 3, but you have Counts 1, 2 and 4 in  
19 this document, and I have marked it as Court  
20 Exhibit A, and that will come to you in the  
21 jury room. Now, the fact that I have marked  
22 this as a court exhibit is not intended to give  
23 it any special standing or prestige. It is  
24 just that it is not a Government exhibit, as  
25 we have been talking about, and it is not a

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

1 defendant's exhibit, as we have been talking  
2 about. In fact, I do this to submerge or do  
3 away with any prestige that this document has  
4 because, as I told you at the outset, and I will  
5 tell you again, it is merely an indictment. It  
6 is merely something that tells Mr. Wishart and  
7 originally Mr. Miller and the members of the  
8 public what the charges are. It is merely a  
9 paper that brings it into court and nothing in  
10 here is evidence. So you will have it with you  
11 just as a guideline to see what the charges are,  
12 and you are not to give any effect to it. Mr.  
13 Wishart will have his guilt or innocence, as  
14 to each of the charges, determined by what you  
15 heard from the witness stand and what you have  
16 in the documents and in the way of evidence.  
17 Now, also the testimony, of course, that Mr.  
18 Miller who is, as you will see, charged in the  
19 indictment as a co-defendant and has already  
20 pleaded guilty to some involvement in this same  
21 line of events, and you are to put that out of  
22 your mind. The fact that Mr. Miller may have  
23 pleaded guilty, may have been found guilty even,  
24 which did not happen here, in some cases it  
25 does, has no bearing upon the guilt or innocence



1 of Mr. Wishart. This you have to gain completely  
2 separately, again on the basis of the evidence,  
3 as you determine that as to each count, each of  
4 the three counts.

5 Now, generally you have to be acquainted  
6 with the immigration laws. The Immigration and  
7 Naturalization Service is part of the Department  
8 of Justice of the United States, and it is given  
9 jurisdiction and supervision and control over  
10 the entry of aliens into the United States, and  
11 the inspectors of the Immigration and Natural-  
12 ization Service have the right to administer  
13 oaths and take and consider evidence pertaining  
14 to the privilege or right of any alien to enter,  
15 reenter, pass through or reside in the United  
16 States. Among the official duties of the Border  
17 Patrol agents and immigration officers of the  
18 Immigration and Naturalization Service are the  
19 detection and apprehension of persons unlawfully  
20 entering the United States or assisting others  
21 unlawfully to enter the United States. In the  
22 performance of such official duties, an agent  
23 of the Immigration and Naturalization Service  
24 is authorized by law to investigate suspected  
25 violations of federal immigration laws and to

1 arrest any person who such officers may have  
2 probable cause to believe committed an offense  
3 against those immigration laws of the United  
4 States.

5 Count 2, one of the substantive counts of  
6 the indictment, charges Mr. Wishart with having  
7 on or about the 8th day of January, 1977, at  
8 the Peace Bridge, Buffalo, New York, in the  
9 Western District of New York, and the Western  
10 District of New York is an area of seventeen  
11 counties in this end of the state, the defendant,  
12 Gormanston Wishart, unlawfully did bring into  
13 the United States by means of an automobile  
14 Harri Prashad, an alien not lawfully entitled  
15 to enter or reside within the United States,  
16 in violation of Title 8, United States Code,  
17 Section 1324(a)(1). At the time and place afore-  
18 said the defendant, Lloyd H. Miller, did aid,  
19 abet, counsel, command, induce and procure the  
20 offense alleged herein, in violation of Title 8,  
21 United States Code, Section 1324(a)(1) and  
22 Title 18, Section 2. As I mentioned before,  
23 the indictment just lays the charges, and also  
24 you are not to be concerned with the second  
25 portion of what I have read, which deals with



1 Mr. Miller and talks about the aiding and abetting.  
2 That has no relation to Mr. Wishart, it is just  
3 that first paragraph where it charges that Mr.  
4 Wishart unlawfully brought Mr. Prashad into the  
5 United States by automobile that you are con-  
6 cerned with.

7 The section of the statute that I talked  
8 about, namely, Section 1324(a)(1) of Title 8  
9 of the United States Code provides: "Any person,  
10 including the owner or operator of any means  
11 of transportation, who brings into the United  
12 States by any means of transportation or other-  
13 wise any alien not lawfully entitled to enter  
14 or reside within the United States shall be  
15 guilty of an offense against the laws of the  
16 United States." In order to prove such a crime  
17 the Government must show and you must find four  
18 essential elements beyond a reasonable doubt --  
19 you will find my mentioning that phrase from  
20 point to point and later on I will define it  
21 for you -- in order to establish the offense  
22 charged in Count 2 of the indictment. First,  
23 it must be shown and you must find that Mr.  
24 Wishart transported an alien into the United  
25 States; secondly, that the alien, Mr. Prashad,

ing. 1 was not lawfully entitled to enter or reside  
2 in the United States; third, that the defendant  
3 knew that the person he was transporting into  
4 the United States was an alien and was not per-  
5 mitted to enter or reside in the United States,  
6 and lastly and fourthly, that the defendant,  
7 Mr. Wishart, acted willfully in furtherance of  
8 the alien's violation of the immigration laws.

9 Now, the burden is always upon the prosecu-  
10 tion, the Government, here represented by Mr.  
11 Burns, to prove beyond a reasonable doubt every  
12 essential element of the crime charged, and  
13 the law never imposes upon the defendant, Mr.  
14 Wishart in this case, the duty or burden of  
15 calling any witnesses or producing any evidence.

16 I mentioned willfully as being part of  
17 the elements that must be shown, and I tell  
18 you that an act is done willfully if it is done  
19 voluntarily, purposely, and with a specific  
20 intent to do that which the law forbids, namely,  
21 with the purpose either to disobey the law or  
22 disregard the law. An alien is defined as any  
23 person who is neither a native born nor natural-  
24 ized citizen nor a national of the United  
25 States. The term "national of the United States"



1 includes a person who though not a citizen of  
2 the United States owes permanent allegiance to  
3 the United States.

4 Relative to the lawful entry of an alien,  
5 another section of that same title of the United  
6 States Code is broken down into titles or sub-  
7 ject matters, but Section 1182(a)(26) of the  
8 United States Code, Title 8, provides that in  
9 order for a non immigrant or visitor entering  
10 the United States for business or pleasure to  
11 be entitled legally to enter the United States,  
12 he needs a valid unexpired passport and either  
13 a valid unexpired non immigrant visa or a valid  
14 unexpired border crossing identification card  
15 in order to enter. The regulations of the  
16 Immigration and Naturalization Service provide  
17 that an alien is not lawfully entitled to enter  
18 the United States as an immigrant unless he  
19 presents either a valid unexpired immigrant  
20 visa or an alien registration receipt card  
21 issued to him by the United States Immigration  
22 and Naturalization Service or a valid unexpired  
23 reentry permit issued to him together with a  
24 valid unexpired passport, and another section  
25 of that same title, Section 1182(a)(19) -- you

1 don't have to worry about remembering those  
2 numbers, but I want to put them into the record --  
3 provides that an alien is not lawfully entitled  
4 to enter the United States if he seeks to pro-  
5 cure or has sought to procure or has procured  
6 a visa or other documentation or seeks to enter  
7 the United States by fraud or by willfully mis-  
8 representing a material fact, and another section  
9 of that same title, Section 1325, provides that  
10 an alien unlawfully enters the United States  
11 if he enters the United States at any time or  
12 place other than is designated by the immigra-  
13 tion officers or, two, eludes examination or  
14 inspection by immigration officers -- you can  
15 see that neither of those two has applicability  
16 here -- or, three, obtains entry to the United  
17 States by willfully false or misleading re-  
18 presentations or the willful concealment of a  
19 material fact.

20 Now, if you find beyond a reasonable doubt  
21 that Harri Prashad was an alien and that he  
22 entered the United States by using a false im-  
23 migration document, that is, an immigration  
24 document issued to someone else or someone else's  
25 identification, you may find that Harri Prashad



1 was not lawfully entitled to enter the United  
2 States. However, you may not find the defendant,  
3 Gormanston Wishart, guilty unless you further  
4 find beyond a reasonable doubt that Mr. Wishart  
5 knew that Harri Prashad was an alien who was  
6 not lawfully entitled to enter the United States  
7 and that he, Mr. Wishart, willfully brought Mr.  
8 Prashad into this country. Actual knowledge  
9 that the person being transported into the United  
10 States by the defendant was an alien, that he  
11 was not lawfully entitled to enter the United  
12 States, is an essential element of the offense  
13 charged. You cannot find Mr. Wishart guilty  
14 unless you find beyond a reasonable doubt that  
15 he knew that Mr. Prashad, the person he was  
16 transporting into the United States, was an  
17 alien who was not lawfully entitled to enter  
18 the United States. It is not sufficient to  
19 show that Mr. Wishart may have suspected or  
20 thought that Mr. Prashad was an alien who was  
21 not lawfully entitled to enter the United States.  
22 Saying that an alien was not lawfully entitled  
23 to enter the United States means that in this  
24 case such entry was obtained in an unlawful  
manner, and unlawfully means contrary to law.

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

1 You do an act unlawfully if you do it willfully,  
2 you willfully do something that is contrary to  
3 the law.

4 Now, I will talk about direct and circum-  
5 stantial evidence later in this charge, but I  
6 will tell you now that the fact of knowledge  
7 may be established by direct or circumstantial  
8 evidence or a combination of such evidence, just  
9 as any other fact in the case can be established  
10 and, further, I will tell you that an act is  
11 done knowingly or with knowledge if it is done  
12 voluntarily and intentionally, and not because  
13 of mistake or accident or innocent reason.

14 Now, Count 4 of the indictment, which is  
15 the one that deals with the charge that Mr.  
16 Wishart unlawfully resisted, and so forth, Mr.  
17 Robinson reads as follows: "That on or about  
18 the 8th day of January, 1977, in Buffalo, New  
19 York, in the Western District of New York, the  
20 defendant, Gormanston Wishart, did forcibly  
21 assault, resist, oppose, impede, intimidate and  
22 interfere with David M. Robinson, an immigra-  
23 tion officer, while said officer was engaged in  
24 the performance of his official duties." All  
25 this in violation of Title 18, which is the



1 Criminal Code of the United States, Section  
2 111 and 1114. The first of those sections,  
3 Section 111, provides that whoever forcibly  
4 assaults, resists, opposes, impedes, intimidates  
5 or interferes with any person designated in  
6 Section 1114 of this title, while engaged in  
7 or on account of the performance of his official  
8 duties, is guilty of an offense against the  
9 laws of the United States, and Section 1114  
10 shows that an immigration officer, such as a  
11 Border Patrol agent, is such a person as is  
12 referred to and intended to be included in  
13 Section 111.

14 Again we have the essential elements which  
15 the Government has to show beyond a reasonable  
16 doubt and to your satisfaction in order to  
17 establish this offense and, firstly, that the  
18 act or acts of forcibly assaulting, resisting,  
19 opposing, impeding, intimidating and interfering  
20 with an officer of the Immigration and Natural-  
21 ization Service, while such officer was en-  
22 gaged in the performance of his official duties,  
23 as charged; secondly, doing those acts willfully.  
24 Now, as stated before, the burden is always  
25 upon the prosecution, the Government, to prove

1 beyond a reasonable doubt each of those essential  
2 elements, and Mr. Wishart has no burden or duty  
3 of putting on any evidence by way of witnesses  
4 or otherwise in that connection. It is suf-  
5 ficient if you find beyond a reasonable doubt  
6 that the defendant did either assault or resist  
7 or oppose or impede or intimidate or interfere  
8 with Agent Robinson while Agent Robinson was  
9 engaged in the performance of his official  
10 duties, and then, of course, you must also find  
11 that the defendant did that willfully. I  
12 particularly call that to your attention because  
13 as you look at the indictment, and particularly  
14 Count 4, you will see that those are stated in  
15 the conjunctive. In other words, the allega-  
16 tion is that he did forcibly assault, resist,  
17 oppose, impede, intimidate and interfere. I  
18 will tell you that the law is that it is suf-  
19 ficient to a conviction if you find beyond a  
20 reasonable doubt that Mr. Wishart did any one  
21 of those. In other words, that is why I em-  
22 phasize the disjunctive, as far as the quality  
23 of proof that you need to find.

24 It talks about assault, and this is some-  
25 thing that is often misunderstood and needs



1 definition. Any willful attempt or threat to  
2 inflict injury upon the person of another, such  
3 as an immigration officer here, when coupled  
4 with an apparent present ability to do so and  
5 any intentional display of force, such as would  
6 give the immigration officer reason to fear or  
7 expect immediate bodily harm constitutes an  
8 assault. An assault may be committed without  
9 actually touching or striking or doing bodily  
10 harm to the other person. However, mere verbal  
11 opposition or remonstrance or a mere threat to  
12 inflict bodily injury alone is insufficient un-  
13 less there is also a sufficient display of  
14 force coupled with that present apparent abili-  
15 ty to make it reasonable for the immigration  
16 officer to fear or expect immediate bodily harm.  
17 Now, if you find beyond a reasonable doubt that  
18 the defendant, Mr. Wishart, had the apparent  
19 present ability to inflict bodily harm or in-  
20 jury to the immigration officer, and willfully  
21 attempted or threatened to inflict such harm,  
22 then the defendant may be found guilty of  
23 forcibly assaulting the immigration officer,  
24 if you also find beyond a reasonable doubt that  
25 the defendant intentionally displayed such

**H. T. Noel & E. F. Knisley**

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

1 force as would give the immigration officer  
2 reason to fear or expect the bodily harm.

3 Now, there's testimony in the case from  
4 which you may find, if you so decide, that the  
5 defendant knew that the man asking him questions  
6 was an immigration officer, but I tell you that  
7 knowledge of the identity or official character  
8 of the person assaulted, namely, Mr. Robinson,  
9 is not an essential element of the offense. It  
10 is essential that he be an immigration officer  
11 in this situation and that he be acting in the  
12 line of his official duties, but it is not es-  
13 sential that Mr. Wishart have known at that time  
14 that Mr. Robinson was an immigration officer.  
15 Now, defendant by implication and argument,  
16 implication from the cross-examination by his  
17 capable attorney, Mr. Mahoney and his argument  
18 asserts that he was not lawfully arrested, and  
19 justifying a force that he used, if he used any  
20 force, is absolutely necessary to free himself  
21 from the restraint. If you find beyond a rea-  
22 sonable doubt that the border patrol agents,  
23 particularly Mr. Robinson, has reason to believe  
24 that Mr. Wishart was violating or had violated  
25 the immigration laws, then Mr. Robinson had the



1 right to identify himself and to make a lawful  
2 arrest of the defendant without a warrant, and  
3 the defendant had no right to resist arrest.  
4 This is so even though the defendant may not  
5 in fact had been guilty of violating the im-  
6 migration laws or any other laws. But unless  
7 you find beyond a reasonable doubt that the  
8 arrest was lawful in those circumstances, then  
9 you would have to acquit the defendant.

10 Now, I have dealt now with the two sub-  
11 stantive counts, and I come to Count 1, which  
12 is the count wherein conspiracy is alleged,  
13 and I will read it to you. It says, "That be-  
14 ginning on or about the 7th day of January, 1977  
15 and continuing through the 8th day of January,  
16 1977, in the Western District of New York and  
17 elsewhere, the defendants, Gormanston Wishart  
18 and Lloyd H. Miller, did unlawfully combine,  
19 conspire and agree together, and with each  
20 other, and with Harri Prashad, named herein,  
21 as a co-conspirator but not a co-defendant,  
22 to commit an offense against the United States,  
23 to wit, to violate Title 8, United States Code,  
24 Section 1324(a)(1) -- you will remember that  
25 is the one I talked about when I talked about

1 Count 2 -- by unlawfully bringing Harri Prashad  
2 into the United States," and this being in  
3 violation of Title 18, United States Code,  
4 Section 371. Then follows a list of what we  
5 call overt acts, six of them, and I will tell  
6 you more about those, but I will read those to  
7 you now. It says, "At the times herein mentioned  
8 the defendants committed the following overt  
9 acts in furtherance of said conspiracy and to  
10 effect the objects thereof: (1) On or about  
11 the 7th day of January, 1977, the defendant,  
12 Gormanston Wishart, met with Harri Prashad at  
13 a residence in Kitchener, Ontario. (2) On or  
14 about the 7th day of January, 1977, the defendants,  
15 Gormanston Wishart and Lloyd H. Miller, traveled  
16 from Kitchener, Ontario to Fort Erie, Ontario.  
17 (3) On or about the 8th day of January, 1977,  
18 the defendant Gormanston Wishart, rented a room  
19 at the Fort Villa Motel in Fort Erie, Ontario.  
20 (4) On or about the 8th day of January, 1977,  
21 the defendant, Lloyd H. Miller, gave Canadian  
22 immigration identification record number -- it  
23 gives the seral number -- to the defendant,  
24 Gormanston Wishart, in Fort Erie, Ontario. (5)  
25 On or about the 8th day of January, 1977, the

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK



1 defendant, Gormanston Wishart, drove an auto-  
2 mobile across the Peace Bridge in Buffalo, New  
3 York with Harri Prashad. (6) On or about the  
4 8th day of January, 1977, the defendants Gormanston  
5 Wishart and Lloyd H. Miller, traveled from  
6 Niagara Falls, New York to the Greyhouse Bus  
7 Station in Buffalo, New York."

8 This conspiracy is said to be in violation  
9 of Section 371 of the Criminal Code, and that  
10 says that if two or more persons conspire to  
11 commit any offense against the United States  
12 and one or more of such persons do any act to  
13 effect the object of the conspiracy, then each  
14 is guilty of an offense against the United  
15 States. Again, we have the essential elements  
16 of that crime that would have to be proven by  
17 the Government beyond a reasonable doubt. They  
18 are, first, that the conspiracy described in the  
19 indictment was willfully formed and was existing  
20 at or about the time alledged. Second, that  
21 the defendant willfully became a member of the  
22 conspiracy. Third, that one of the conspirators  
23 thereafter, and if we are not talking about the  
24 defendant, also the defendant were members of  
25 the conspiracy and knowingly committed at least

1 one of the overt acts which is charged in the  
2 indictment at or about the time or place alleged.  
3 That means any one of the six that I enumerated.  
4 Fourth, that such overt act was knowingly done  
5 in furtherance of some object or purpose of the  
6 conspiracy as charged.

7 Now, if you should find beyond a reasonable  
8 doubt from the evidence in the case that the  
9 existence of the conspiracy charged in the in-  
10 dictment has been proved, and that during the  
11 existence of the conspiracy at least one of the  
12 overt acts alleged was knowingly done by one  
13 of the conspirators as a member in furtherance  
14 of some object or purpose of the conspiracy,  
15 then the proof of the conspiracy offense charged  
16 is complete and it is complete as to every  
17 person found by you to have been willfully a  
18 member of the conspiracy at the time the overt  
19 act was committed, regardless of which one of  
20 the conspirators did the overt act. As stated  
21 before, the burden is always upon the prosecu-  
22 tion, the Government, to prove beyond a reasonable  
23 doubt every essential element of the crime  
24 charged and, again, the law never imposes upon  
25 Mr. Wishart here the burden or duty of putting

**H. T. Noel & E. F. Knisley**

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK



1 in any evidence.

2 Now, a conspiracy is defined as a combina-  
3 tion of two or more persons by concerted action  
4 to accomplish some unlawful purpose or to ac-  
5 complish a lawful purpose by unlawful means.  
6 Thus, a conspiracy is a kind of a partnership  
7 in criminal purposes in which each member be-  
8 comes the agent of every other member, and the  
9 gist of the offense is the combination or agree-  
10 ment to violate or disregard the law. Now,  
11 mere similarity of conduct among various persons  
12 and the fact that they may have associated  
13 with each other and may have assembled together  
14 and discussed common names and interests does  
15 not necessarily establish proof of the existence  
16 of the conspiracy. However, the evidence need  
17 not show that the members entered into any ex-  
18 pressed or formal agreement or that they direct-  
19 ly by words spoken or in writing stated be-  
20 tween themselves or among themselves what their  
21 object or purpose was to be or the details  
22 thereof or the means by which the object or  
23 purpose was to be achieved. What the evidence  
24 must show beyond a reasonable doubt in order  
25 to establish proof that a conspiracy existed

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

1 is that the members in some way or manner or  
2 through some contrivance positively or tacitly  
3 came to some mutual understanding to try to  
4 accomplish a common and unlawful plan. Now,  
5 it is not necessary for the prosecution to prove  
6 that all the means or methods set forth in the  
7 indictment were agreed upon to carry out the  
8 conspiracy or that all such means or methods  
9 were actually used or put into operation. It is  
10 necessary that the evidence establish beyond a  
11 reasonable doubt that one or more of the means  
12 or methods described in the indictment was  
13 agreed upon to be used in an effort to effect  
14 or accomplish some object or purpose of the  
15 conspiracy as it is charged in the indictment.  
16 Now, one may become a member of a conspiracy  
17 without having full knowledge of all of the  
18 details of the conspiracy. On the other hand,  
19 a person who has no knowledge of conspiracy,  
20 but merely happens to act in a way which furthers  
21 an object or purpose of the conspiracy, does  
22 not thereby become a conspirator. Before you  
23 can find that the defendant or any other person  
24 has become a member of a conspiracy the evidence  
25 must show that the conspiracy was formed and



1 that the defendant or other person who is claimed  
2 to have become a member knowingly and willfully  
3 participated in the unlawful plan with the  
4 intent to advance or further some object or  
5 purpose of the conspiracy. To participate  
6 knowingly and willfully means to participate  
7 voluntarily and understandingly, and with the  
8 specific intent to do some act which the law  
9 forbids or with specific intent to fail to do  
10 some act that the law requires to be done, that  
11 is to say, to participate with bad purpose,  
12 either to disobey or disregard the law. So  
13 if Mr. Wishart, the defendant here, or any  
14 other person, with understanding of the unlawful  
15 character of a plan, intentionally encourages,  
16 advises or assists for the purpose of further-  
17 ing the undertaking or scheme, he thereby be-  
18 comes a knowing and willful participant, a  
19 conspirator. One who willfully and knowingly  
20 joins an existing conspiracy is charged with  
21 the same responsibility as if he had been one  
22 of the instigators of the conspiracy. Now,  
23 in determining whether or not Mr. Wishart or  
24 any other person was a member of a conspiracy,  
25 you are not to consider what others may have

1 done or may have said, that is to say, the  
2 membership of a defendant, or any other person  
3 whose membership you are considering, in a  
4 conspiracy must be established by evidence as  
5 to that person's own conduct, and what he, him-  
6 self, did or said. The indictment alleges a  
7 conspiracy among Mr. Wishart, Mr. Miller and  
8 Mr. Prashad. Mr. Miller and Mr. Wishart being  
9 named as defendants and Mr. Prashad being named  
10 as a conspirator, not as a defendant. A person  
11 cannot conspire with himself, therefore you cannot  
12 find Mr. Wishart guilty unless you find beyond  
13 a reasonable doubt that he participated in the  
14 conspiracy with at least one other person, whether  
15 it was with Mr. Miller or with Mr. Prashad or  
16 with both. You therefore may find Mr. Wishart  
17 guilty under Count 1 even though you find that  
18 he conspired only with Mr. Miller or only with  
19 Mr. Prashad. If and when it is found by you  
20 from the evidence that a conspiracy existed and  
21 that the defendant was one of the members, then  
22 the acts which are thereafter knowingly done  
23 and the statements which are thereafter knowingly  
24 made by any person likewise found by you to be  
25 a member, and while such person is a member,

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK



1 may be considered by you as evidence in the  
2 case as to the defendant, even though the acts  
3 and statements may have occurred in the absence  
4 and without the knowledge of the defendant,  
5 provided the acts and statements were knowingly  
6 done and made during the continuance of the  
7 conspiracy and in furtherance of an object or  
8 purpose of the conspiracy. Now, otherwise any  
9 act done or any admission or incriminatory  
10 statement made outside of court by one person  
11 may not be considered as evidence against any  
12 person who is not present and heard the state-  
13 ment made. Therefore the acts or statements of  
14 any conspirator which are not in furtherance  
15 of the conspiracy or which were made before it  
16 came into being or after its termination may be  
17 considered only as evidence against the person  
18 doing or making them. Now, again I mentioned  
19 willfully, and I will define it for a third time.  
20 An act is done willfully if it is done voluntar-  
21 ily and purposely, and with the specific intent  
22 to do that which the law forbids, that is, with  
23 the purpose either to disobey the law or to  
24 disregard the law. Again, an act or failure to  
25 act is knowingly done or omitted if it is done

**H. T. Noel & E. F. Knisley**

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

1 or omitted voluntarily and intentionally, and  
2 not because of mistake or accident or other  
3 innocent reason. The purpose of adding the  
4 word "knowingly" was to insure that no one would  
5 be convicted of a crime because of an act or  
6 failure to act due to mistake or accident or  
7 other innocent reason. Now, in your considera-  
8 tion of the evidence in the case as to the  
9 offense of conspiracy as charged, you should  
10 first determine whether or not the conspiracy  
11 existed, as I have said, then if you conclude  
12 it did exist, you determine whether or not Mr.  
13 Wishart willfully became a member, and if it  
14 appears beyond a reasonable doubt from the  
15 evidence in the case that the conspiracy was  
16 willfully formed and he did become a member  
17 willfully either at the inception of the con-  
18 spiracy or afterwards, and that thereafter one  
19 or more of the conspirators knowingly committed  
20 one or more of the overt acts -- these being  
21 the six I enumerated -- charged, in furtherance  
22 of some object or purpose of the conspiracy,  
23 then there may be a conviction, even though the  
24 conspirators may not have succeeded in accomplish-  
25 ing their common object or purpose and, in fact,



1 may have failed to do so. The extent of a  
2 defendant's participation moreover is not de-  
3 terminative of his guilt or innocence. A de-  
4 fendant may be convicted as a conspirator even  
5 though he may have played only a minor part in  
6 the conspiracy. I read the overt acts and,  
7 again, an overt act is an act knowingly committed  
8 by one of the conspirators in an effort to  
9 effect or accomplish some object or purpose of  
10 the conspiracy. The overt act itself need not  
11 be criminal in nature if it is considered  
12 separately and apart from the conspiracy. It  
13 may be as innocent as the act of walking across  
14 the street or driving an automobile or using a  
15 telephone. However, it must be an act which  
16 follows and tends toward accomplishment of the  
17 plan or scheme, and must be knowingly done in  
18 furtherance of some object or purpose of the  
19 conspiracy charged in the indictment. Now,  
20 there are certain rules of law, some of which  
21 I have already mentioned, which are common to  
22 all criminal cases and which you must apply in  
23 reviewing the evidence which is before you.  
24 The basic rule in all criminal cases is that  
25 the defendant is presumed to be innocent, and

1 presumption of innocence remains with the de-  
2 fendant throughout the trial, and it continues  
3 to exist until such time as each of you is con-  
4 vinced beyond a reasonable doubt by legal and  
5 competent evidence that the defendant is guilty  
6 of the offense or offenses charged. The burden  
7 of proof that a person is guilty beyond a rea-  
8 sonable doubt rests with the Government at all  
9 times, it never shifts to the defendant, and  
10 in order to sustain its burden, the Government  
11 must present proof which is sufficiently strong  
12 to convince each of you of the defendant's  
13 guilt beyond a reasonable doubt. The require-  
14 ment that the prosecution prove the defendant's  
15 guilt beyond a reasonable doubt extends to every  
16 essential element of each crime charged against  
17 the defendant, as I have enumerated those es-  
18 sential elements. If you have a reasonable  
19 doubt at any point with respect to a particular  
20 count under consideration, you must acquit the  
21 defendant on that count, and you must, as to  
22 that count, find him not guilty. You will,  
23 of course, separately weigh and determine the  
24 evidence as to each of the three counts in the  
25 indictment, and you will determine the guilt or

**H. T. Noel & E. F. Knisley**

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK



1 innocence of the defendant as to each count  
2 separately.

3 Now, I mentioned "reasonable doubt" and  
4 the phrase "beyond a reasonable doubt," and I  
5 will tell you that reasonable doubt is a doubt  
6 based upon reason and common sense and arising  
7 from the state of the evidence. It is rarely  
8 possible to prove anything to an absolute cer-  
9 tainty, and proof beyond a reasonable doubt  
10 therefore is established if the evidence is  
11 such as you would be willing to rely and act  
12 upon in the most important of your own affairs.  
13 The defendant is not to be convicted on mere  
14 suspicion or conjecture. A reasonable doubt  
15 may arise not only from the evidence produced  
16 but from a lack of evidence, and because the  
17 burden is upon the prosecution, the Government,  
18 to prove beyond a reasonable doubt that the  
19 defendant is guilty of every essential element  
20 of the crimes charged, the defendant has the  
21 right to rely upon any failure of the prosecu-  
22 tion to establish such proof, and the defendant  
23 may also rely upon evidence brought out on  
24 cross-examination of witnesses for the prosecu-  
25 tion, and the law, as I have said, does not

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

1 impose upon the defendant any duty of producing  
2 any evidence. Now, remember that a reasonable  
3 doubt is such a doubt as is based upon reason  
4 and as appeals to your power of logic. It is  
5 a doubt arising out of something tangible in  
6 the case or something lacking in the case. It  
7 is to be distinguished from a doubt which might  
8 be based upon some emotion, such as a whim or  
9 a fancy, and simply stated, it is a doubt for  
10 which you have a reason. You need not be able  
11 to formulate that reason in words, some people  
12 can and others cannot, but it must be a doubt  
13 for which you have a reason. If you feel un-  
14 certain and not fully convinced that the de-  
15 fendant is guilty of the crime charged, and you  
16 believe you are acting in a reasonable manner,  
17 and you believe a reasonable man or woman in any  
18 matter of like importance would hesitate to  
19 convict because of such a doubt as you have,  
20 that is a reasonable doubt, to the benefit of  
21 which the defendant is entitled, and if you have  
22 such a doubt, you must acquit. A reasonable  
23 doubt in your mind as to any essential element  
24 of the crime entitles the defendant to an  
25 acquittal of the crime involved. Now, however,



1 the rule that the Government must prove every  
2 essential element of the crime beyond a rea-  
3 sonable doubt does not mean that you must be-  
4 lieve the testimony of every Government witness  
5 as being true beyond a reasonable doubt or that  
6 every piece of evidence the Government has of-  
7 fered is true beyond a reasonable doubt. It  
8 means only that the credible evidence, as weighed  
9 and found by you under these instructions, and  
10 viewed as a whole, must establish every essential  
11 element of the crime and the defendant's guilt  
12 beyond a reasonable doubt.

13 Now, I mentioned earlier that there are  
14 two types of evidence which you can properly  
15 utilize and weigh in determining the defendant's  
16 guilt or innocence, and proof can consist of  
17 the testimony of those who have witnessed the  
18 defendant's conduct or heard his words and who  
19 testified to that conduct and those words in the  
20 course of the trial. We call this direct  
21 evidence or eyewitness evidence. On the other  
22 hand, proof of a chain of circumstances point-  
23 ing to the commission of an offense by the  
24 defendant is termed circumstantial evidence,  
25 and you can, of course, consider and find that

1 both types of evidence, direct and circumstantial,  
2 bear on the question of the innocence or guilt  
3 of the defendant. As a general rule, the law  
4 makes no distinction between direct and cir-  
5 cumstantial evidence, but simply requires that  
6 before convicting a defendant you be satisfied  
7 of his guilt beyond a reasonable doubt. You are  
8 permitted to draw from one fact the existence  
9 of another, if reason and experience support  
10 the inference, that is to say, you can draw  
11 from facts, which you find to have been proven,  
12 such reasonable inferences as seem justified  
13 by reason and logic in light of your own ex-  
14 periences in life. Basically an inference is  
15 nothing more than a deduction or conclusion which  
16 reason and common sense lead you to draw from  
17 the facts which have been proven. Any inference  
18 which you draw must reasonably flow from the  
19 evidence and must be based upon facts established  
20 by the evidence. Because a permissible in-  
21 ference in law must flow naturally from and be  
22 based upon facts established by the evidence,  
23 it follows that you may not base further in-  
24 ferences merely on inferences previously drawn.  
25 One inference cannot be based upon or drawn

**H. T. Noel & E. F. Knisley**

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK



1 from another inference. If in the course of  
2 your consideration of all of the evidence as  
3 to the defendant you find that certain evidence  
4 admits equally of two inferences, one support-  
5 ing innocence, the other supporting guilt, you  
6 must accept the inference supporting innocence  
7 and reject the inference supporting guilt.

8 Now, intent is the purpose or aim or state  
9 of mind with which a person acts or fails to  
10 act, and an act or failure to act is knowingly  
11 done, as I have said before if it is done vol-  
12 untarily and intentionally, and not because of  
13 mistake or accident or other innocent reason.  
14 Now, intent you will recognize can rarely be  
15 established by direct evidence, and usually is  
16 only provable by indirect or circumstantial  
17 evidence. While witnesses may see and hear and  
18 so be able to give direct or eyewitness evidence  
19 of what a person does or fails to do or says,  
20 there can be, of course, no eyewitness account  
21 of the state of mind with which the acts were  
22 done or omitted. What a person does or fails  
23 to do or says may indicate either intent or  
24 lack of intent to act or to fail to act. Unless  
25 otherwise instructed, in determining any issue

**H. T. Noel & E. F. Knisley**

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

1 involving intent, you can consider all of the  
2 facts and circumstances in evidence in the case,  
3 which aid you in the determination of the state  
4 of mind.

5 Now, as the sole judges of the facts, you  
6 must determine which of the witnesses you be-  
7 lieve, what portion of their testimony you  
8 accept, and what weight you attach to it. I  
9 told you before that I had stricken some testi-  
10 mony from the record, and I sustained objections  
11 to questions without permitting the witness  
12 to answer, and I tell you now that you cannot  
13 draw any inference from an unanswered question  
14 and you cannot consider testimony which has been  
15 stricken in reaching your decision. The law  
16 requires that your decision be made solely on  
17 the competent evidence before you, and what I  
18 have excluded from your consideration is not  
19 legally admissible and cannot be considered.  
20 You are the sole judges of the weight you are  
21 going to assign to the testimony of the dif-  
22 ferent witnesses. Some of the evidence in the  
23 case may be more believable than other evidence.  
24 The matter of the credibility of the witnesses  
25 you have heard is one of the questions of fact

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK



1 which you must take into consideration in arri  
2 ing at your verdict, and you are entitled to  
3 and you should utilize in this connection your  
4 observation of the witnesses as they appeared  
5 before you and your own experience in your  
6 respective lives in deciding whether and when  
7 someone is telling the truth. You may find  
8 one witness was a better observer, had a more  
9 accurate memory or otherwise was more reliable  
10 than other witnesses. You may take into con-  
11 sideration in evaluating the testimony the  
12 demeanor of the witness on the stand and the  
13 interest or lack of interest which he or she  
14 has in the outcome of the litigation. If you  
15 find that a witness has knowingly testified  
16 falsely, lied, concerning any material matter,  
17 you have a right to discount, to disregard his  
18 or her entire testimony or you can take from  
19 such testimony that which you believe to be  
20 true and disregard or set aside that which you  
21 believe not to be true. Now, a witness knowin  
22 ly lies or testifies falsely if he or she thus  
23 testifies intentionally, and not because of  
24 mistake or other innocent reasons.

25 Now, the Government's witnesses, Mr. Miller

**H. T. Noel & E. F. Knisley**

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

1 who is named in the indictment as a defendant,  
2 and Mr. Prashad, who is named in the indictment  
3 as a co-conspirator, but not as a defendant,  
4 testified to an involvement in the alleged il-  
5 legal acts which are charged in the indictment.  
6 Consequently, their testimony must be viewed  
7 by you as the testimony of an accomplice. An  
8 accomplice is one who unites with another person  
9 in the commission of a crime voluntarily and  
10 with common intent. An accomplice does not  
11 become incompetent as a witness because of  
12 participation in the criminal act charged. On  
13 the contrary, the testimony of an accomplice  
14 may be received in evidence and considered by  
15 you even though not corroborated or supported  
16 by other evidence. However, you should keep  
17 in mind that such testimony is to be given close  
18 and searching scrutiny and is to be received  
19 with caution and weighed with great care. You  
20 should not convict the defendant upon the un-  
21 supported testimony of an accomplice unless  
22 you believe the unsupported testimony beyond  
23 a reasonable doubt. Thus in judging the testi-  
24 mony of these witnesses and in considering factors,  
25 which I mentioned earlier in connection with



1 your determination of credibility or believabil  
2 ity, you will follow these instructions just  
3 mentioned.

4 A defendant in our courts is under no  
5 obligation to give any evidence whatsoever. Yo  
6 are not to draw any inference from the failure  
7 of the defendant in this case to take the stand  
8 He has the right to go to the jury on the con-  
9 tention that the evidence of the Government,  
10 the prosecution here, is insufficient to warrant  
11 his conviction under the rules of law which I  
12 have been outlining to you. You are instructed  
13 as a matter of law, that you are not to be in-  
14 fluenced by the fact that the Government of the  
15 United States is a party to this action, be-  
16 cause I charge you that the Government is to  
17 be considered as any other party, and the Assis  
18 tant United States Attorney is to be considered  
19 as any other lawyer would be considered. The  
20 Government is the prosecutor of the charges  
21 outlined in the indictment, Mr. Burns represents  
22 the Government, and that is the total role of  
23 the Government and Mr. Burns. Your duty is  
24 merely to determine the guilt or innocence of  
25 the defendant. You are not to concern your-

1                   selves in any way with the punishment he may  
2                   receive if convicted.   Punishment is a matter  
3                   with which I shall be concerned, if you con-  
4                   vict the defendant on one or more of the crimes  
5                   with which he is charged.

6                   Now, Mr. Mahoney has stressed fairness in  
7                   your verdict, and he equates fairness to the  
8                   treatment which was being or has been accorded  
9                   Lloyd Miller. There may be legitimate reasons  
10                  for dealing with one person differently than  
11                  another. The Government has permissible discre-  
12                  tion in that area, as do I when I consider the  
13                  proper sentence to be imposed on one who has  
14                  been convicted by his own plea of guilty or  
15                  after a trial. Yours is the duty to determine  
16                  the truth and to render a just verdict that  
17                  accords with that truth. Mr. Miller is not  
18                  on trial before you, Mr. Prashad is not on  
19                  trial before you, Mr. Wishart is on trial before  
20                  you on Counts 1, 2 and 4 of the indictment.

21                  I stress again that you are to find the  
22                  facts, and any examples or factual indications  
23                  that I have given, and I think I made only a  
24                  brief allusion to one, does not indicate any  
25                  opinion on my part as to how you should find



1 on any issue of fact or whether you acquit or  
2 convict the defendant on any of the counts  
3 charged in the indictment. These matters are  
4 solely for your decision, and I have no part  
5 in making that decision, other than to tell you  
6 what the governing law is.

7 Again, do not draw any inferences from  
8 any rulings that I have made as I have been  
9 presiding over the trial. My role has been  
10 merely to keep the trial on course and proceed-  
11 ing in a proper fashion, and even if you do  
12 deduce that there is some leaning one way or  
13 the other on my part, and I think objectively,  
14 as I said before, there is not, give it no  
15 attention at all. Yours is the chore and the  
16 prerogative of deciding all the factual issues,  
17 including the ultimate factual issues of the  
18 guilt or innocence of Mr. Wishart on each of  
19 the three counts.

20 Now, I will remind you at this time that  
21 at the time you were sworn as members of the  
22 jury you said that you would well and truly  
23 try the issues joined in the case and a true  
24 verdict give therein according to the evidence,  
25 so help you God. I suggest to you if you follow

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK



1 that oath and you try the issues without combin-  
2 ing your thinking with any emotion that you will  
3 arrive at a true and just verdict. It must be  
4 clear to you that once you get into an emotional  
5 state and let bias or sympathy or prejudice  
6 interfere with your thinking, you will not  
7 arrive at a true and just verdict. As you de-  
8 liberate, please be careful to listen to the  
9 opinions of the other jurors and ask for an  
10 opportunity to express your own views. No one  
11 juror holds center state in the jury room, and  
12 no one juror controls or monopolizes the de-  
13 liberations. If after listening to the other  
14 jurors and after stating your own views you  
15 become convinced that your view is wrong, do  
16 not hesitate because of stubbornness or pride  
17 of opinion to change your view. On the other  
18 hand, do not surrender your honest convictions  
19 solely because you are outnumbered.

20 Your verdicts must be unanimous, each one must  
21 represent the absolute conviction of each one  
22 of you. Your verdict as to the guilt or in-  
23 nocence of Mr. Wishart on each count must be  
24 reached with all twelve of you agreeing on that  
25 result. You will have a copy of the indictment



1 in the jury room for your reference. I have  
2 marked it, as I said, Court Exhibit A. I re-  
3 mind you again that the indictment is not evid-  
4 ence, it is not in evidence, it is merely a  
5 device to tell the defendant what he is charged  
6 with and does not tend to prove anything what-  
7 soever. Now, when you first get into the jury  
8 room, select one of your number to speak for  
9 you when you come back into the court or when  
10 you otherwise have to be in touch with me, and  
11 any communication that you want to have with  
12 me from your deliberation room, you will do by  
13 means of a note which you will hand to the  
14 deputy marshal who will be on duty outside of  
15 your door, and the deputy marshal will see that  
16 it gets to me. Do not ask the deputy marshal  
17 any questions concerning your duties. By means  
18 of a note, you can ask me questions, you can  
19 request a clarification of my instructions on  
20 the law or a reading of my instructions or all  
21 or part of the testimony of any witness. Use  
22 a note also to tell me when you have reached  
23 your verdict or verdicts or, in appropriate  
24 circumstances, when you find yourselves so dead-  
25 locked that unanimity is impossible. Never

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

1 tell me or anyone else how your voting stands  
2 at any time, except to say in open court that  
3 a verdict or verdicts have been reached unani-  
4 mously. This has reference to occasions when  
5 you may send me a note, do not tell me in the  
6 note how your voting stands on any one count.  
7 If you come into the courtroom and whoever is  
8 speaking for you stands up and asks a question  
9 or answers my question, do not tell me or any-  
10 body how your voting stands, that is to be held  
11 completely within yourselves until you unanimous-  
12 ly reach a verdict for acquittal or for a con-  
13 viction on each count, and then, of course,  
14 your unanimity is expressed by that verdict.

15 Mr. Burns and Mr. Mahoney, do you have any  
16 exceptions or requests and, if so, do you want  
17 to be heard outside the presence of the jury?

18 MR. BURNS: I have nothing, your Honor.

19 MR. MAHONEY: I wish to be heard outside the presence of the  
20 jury.

21 THE COURT: Just step briefly into my hallway again.

22  
23 (Thereupon, the jury exited the courtroom at  
24 5:55 P.M.)  
25



1 THE COURT: Yes, Mr. Mahoney?

2 MR. MAHONEY: With respect to requests Numbers 2 and 4 that I  
3 had originally offered to you, it is not my  
4 feeling that the charge adequately covered  
5 those and what they are designed to protect  
6 against, what they are directed toward. Whether  
7 this is an exception to the charge or a request  
8 for an additional charge, I don't know.

9 THE COURT: I feel that my charge hits the gist of those  
10 and is represented in substance, and I will  
11 leave the charge as it is relative to that.

12 MR. MAHONEY: Additionally, your Honor, I would like to take  
13 exception to the portion of your charge which  
14 referred to my argument, especially with respect  
15 to fairness, and I would also -- in one part  
16 of the charge, your Honor, you did discuss or  
17 you did point to the fact that mere suspicion  
18 of an element having been completed or the  
19 probability of an element of an offense had been  
20 completed with the knowledge that Mr. Prashad  
21 was an illegal alien, not permitted to enter  
22 the country, I would request you charge generally  
23 the mere probability of guilt or the probability  
24 that an element has been established is not  
25 sufficient, as a correlative charge with respect

1 to the burden of proof beyond a reasonable  
2 doubt charge.

3 MR. BURNS: I think you hit reasonable doubt several times,  
4 it was more than adequate to tell the jury  
5 exactly what it means.

6 MR. MAHONEY: My reason for bringing it up, I agree reasonable  
7 doubt was mentioned, the question is understand-  
8 ing what that means, I suppose, but especially  
9 since that -- I don't think it was bad, I think  
10 the instruction you gave with respect to that  
11 element was good, but I am fearful that having  
12 been limited to that element, it may leave the  
13 impression or cause the jurors --

14 THE COURT: I think it was covered adequately, but I will  
15 tell them generally that along with the pre-  
16 sumption of innocence and the admonition to  
17 them that they are not to proceed upon suspicion  
18 or conjecture, that there is no such thing as  
19 probability of guilt.

20 MR. MAHONEY: Thank you.

21 MR. BURNS: I think coming at this late stage, it tips the  
22 balance a little more than it needs to. I agree  
23 with Mr. Mahoney, your charge was good from the  
24 defense standpoint on reasonable doubt, and it  
25 should stand.



1 MR. MAHONEY: What balance?

2 THE COURT: Bring them in.

3

4 (Thereupon, the jury entered the courtroom  
5 at 5:59 P.M.)

6

7 THE COURT: You won't actually have to take your seats, you  
8 can come in to that point. Mr. Mahoney has asked  
9 that I emphasize one aspect which I think you  
10 have before you already, but he couches it in  
11 slightly different terms. He wants me to advise  
12 you that there is no such thing as a probability  
13 of guilt and, as I say, I think you are adequately  
14 advised on that already. I have told you, of  
15 course, that Mr. Wishart is presumed to be  
16 innocent, and that cloak of the presumption of  
17 innocence follows with him to the point when you  
18 have concluded your deliberations and have de-  
19 cided on the evidence and beyond a reasonable  
20 doubt that he is guilty, until that point he  
21 is presumed innocent. I also told you that you  
22 are not to proceed upon and not to convict upon  
23 surmise or conjecture. So I think you have  
24 that already, but this gives it a slightly dif-  
25 ferent twist. Getting back to the indictment,

1 the fact there is an indictment that charges  
2 means nothing, and the fact, in Mr. Mahoney's  
3 words, there is no probability of guilt. The  
4 Government has the burden, the Government must  
5 have carried that burden to your satisfaction  
6 beyond a reasonable doubt, else you must acquit.  
7 If you find the Government has proven it, you  
8 convict on the evidence and not because of any  
9 probabilities. Swear the marshals.

10  
11 (Thereupon, two deputy marshals were duly  
12 sworn.)  
13

14 THE COURT:

15 Now, as I say, as the first order of business,  
16 you will select someone who will be your spokes-  
17 person, and then get yourselves generally organ-  
18 ized, and then as a second order of business,  
19 second or third order of business, consider what  
20 you want to do about dinner. It is completely  
21 up to you whether you want to get into your  
22 deliberations, continue with your deliberations  
23 until you come to a point of decision or whether  
24 you take a break and go for dinner. We will  
25 send you to a restaurant across the street, and  
we should know again by a note coming from you